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MINES AND MINING

A COMMENTARY ON THE LAW OF

MINES AND MINING RIGHTS

BOTH

COMMON LAW AND STATUTORY

WITH APPENDICES

CONTAINING

THE FEDERAL STATUTE AND THE STATUTES OF THE WESTERN STATES AND TERRITORIES RELATING TO MINING FOR PRECIOUS METALS ON THE PUBLIC DOMAIN

AND

FORMS FOR USE IN APPLICATION FOR PATENT AND ADVERSE SUITS

BY

WILSON I. SNYDER

OF THE UTAH BAR

IN TWO VOLUMES

VOLUME I

CHICAGO

T. H. FLOOD AND COMPANY

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PREFACE.

When this work was begun in 1894 no apology was necessary for attempting to collect and systematize, and, if possible, harmonize the decisions on the subject of mining law. At that time the text-books of mining law, and special reports on the subject, consisted of the work of Mr. Morrison, which had appeared through successive editions, some six or seven in number, covering twice as many years, styled "Morrison's Mining Rights," more valuable as a guide for the prospector than as an assistant to the lawyer; the work of Mr. Weeks; that of Mr. Wade, who apologized for the imperfection of his work because the law was in its formative state, and hence could not be accurately written; and of Mr. Gregory Yale, written at a time when such an observation as that made by Mr. Wade would have been indisputable; the discordant grouping of several leading English and American cases and a collection of digest paragraphs by Messrs. Blanchard & Weeks, under the head of "Blanchard & Weeks' Leading Cases on Mines;" and the reports of Mr. Morrison, under the style of "Morrison's Mining Reports," sixteen volumes in all, containing many, but not all, of the mining cases in England and this country.

With the foregoing exceptions no attempt had been made to gather up the threads of the law running through the reports of no less than fourteen states and territories on the coast, as applied to the western law, and those of almost every other state in the Union as applied to the general subject of mining law, as the same existed in England under the common law and came down to us from that source, and to weave them into a fabric having the semblance and form of a text-book on that subject.

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More than fifteen years of practice, with only the works above mentioned and the discordant decisions of the courts as a guide, impressed the writer with the belief that the entire mass of mining law ought to be collected, digested, sifted, and, if possible, harmonized; and that any conscientious attempt made in this direction ought to result in the production of a tool which would be useful, if not instructive, to the busy lawyer.

This work was at once begun, and resulted four years later in the production of enough matter to make a volume of about eight hundred pages, besides a geological preface and the state statutes. This work was destroyed by a great conflagration in Park City, Utah, a mining town where the author lived, on June 19, 1898. Fortunately, however, about two-thirds of it was to be found in the notes of his stenographer, Mr. Bismarck Snyder, then on his way to the Philippines as a member of the Utah Artillery.

A reproduction of the destroyed work was at once begun, mainly for the purpose of writing an article on the same subject for the Encyclopædia of Law.

In the meantime others had appreciated the necessity of such a work, resulting in the almost simultaneous appearance of the works of Mr. Lindley and Messrs. Barringer and Adams, and the digest by Messrs. Clark, Heltman and Consaul.

As the construction of the Encyclopædia article advanced it became quite apparent that within the scope assigned to such an article in that work anything like an exhaustive treatment of many of the questions would be utterly impossible, and an arrangement of the matter for publication in book form was carried on contemporaneously, the right to publish the book having been reserved in the contract with the Edward Thompson Company under which the article was written. The article itself was prepared as compactly as the proper treatment of it seemed to the writer to require, but even then it was materially dimin-

ished in volume by the publishers. This emasculation could not fail to result in some inaccuracies of statement, notably that relating to mining customs, thereby emphasizing the necessity of publication in book form.

Five years have passed since the appearance of the works of Messrs. Lindley *et al.*, above mentioned; the law has undergone considerable change and readjustment at the hands of the court of last resort — the Supreme Court of the United States,— to the extent that a second edition of Mr. Lindley's work is deemed justified if not essential. Besides, there are many subjects in this work not touched, and others only superficially touched (if the writer may assume to criticise), by the otherwise excellent work of Mr. Lindley.

These circumstances seemed to the writer to warrant the production of this work, and at the same time he indulged and now expresses the hope that it may be found useful to his brethren.

The legitimate field of a work on this subject, the writer ventures to assume, covers the entire field of mineral extraction from the earth's crust, whether by mining, as that phrase is ordinarily understood,— that is, digging and excavating the earth's crust by means of shafts, tunnels, drifts, adits, or any other form of sub-surface mining, or by washing and sluicing the alluvial gravel, or the boring for gas or oil. Accordingly, this work has been spread out to cover and treat all these questions, including *inter alia* the subjects of gas and oil leases, and the various rights of the parties, also other rights of miners *inter sese*, such as mining partnership and tenants in common operating mines.

A complete collection of state statutes on the entire subject germane to mining has been made and included in "Appendix B," preceding which is a prefatory note,[1] which explains the arrangement more fully.

A complete examination of all decisions in England and this country has been made, and every case in both countries and in Canada which reflected any light upon the subject

[1] See page 1279.

has received consideration, and, it is believed, all, except those announcing the most elementary principles, have been cited.

To my brother, Bismarck Snyder, who has faithfully assisted throughout; to Messrs. Wolcott & Vaile of the Denver bar; to Messrs. McHatton & Cotter of Butte, Montana; Hon. James B. Catron of the New Mexico bar; Odell D. Thompkins, Esq., formerly of Spokane, Washington, now of Mt. Vernon, N. Y.; Martin & Mason of Deadwood, South Dakota; to Hon. James H. Beatty of Idaho; to Messrs. McGibbon, Casgrain, Ryan & Mitchell of Montreal, Canada; to various Secretaries of State in the Union (who have generously assisted me in regard to their particular statutes); to Mr. George Westervelt, who prepared most of the drawings used, my most sincere acknowledgments are due and are hereby tendered.

Finally, no pains have been spared in the examination and correct citation of cases; yet the author dare not hope it will be found perfect. But with all its imperfections he yields this new child to its new guardians — the profession generally — with the earnest hope that it may prove a guide to many and an assistant to all.

THE AUTHOR.

SALT LAKE CITY, UTAH,
December, 1902.

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THE LAW

OF

MINES AND MINING.

PART I.

OF THE COMPONENT ELEMENTS OF MINING LAW, AND ITS PROGRESSION TOWARDS THE PRESENT LAW.

CHAPTER I.

OF THE SOVEREIGN POWER, OF EUROPEAN SYSTEMS, THE CIVIL AND COMMON LAW AND ROYAL MINES.

ARTICLE A.

Of the Sovereign Power Over Mines and Mineral Lands.

§ 1. Introductory — Whence the law.
2. Why reproduced here — New law predicated upon the old.
3. Early traces of regalian right or ownership of mines.
4. In Continental Europe.
5. Russia excepted — Allodial title there.

§ 1. Introductory — Whence the law. — An eminent lawyer once said, "Law is seldom or never created: it is ascertained."[1] This truth may seem a solecism to those who think they find the foundation of American mining law in the federal statutes. But those who look beyond and find the elementary substance of the federal statute, in many of its features, in the pre-existing laws of Spain, France and

[1] Address of Mr. James C. Carter before the American Bar Association, Saratoga, New York, 1896, 29 Am. Law Review, p. 602.

other continental countries of Europe, in the customs prevailing in at least three counties in England, and in the law which has governed mining in Mexico for two hundred and eighty years prior to the enactment of our statute, will not only fully indorse the same, but will be impressed with the truth uttered by Israel's great law-giver, "There is nothing new under the sun."

§ 2. **Why reproduced here — New law predicated upon the old.**— Since an examination into pre-existing conditions and laws not only affords valuable assistance in arriving at the purpose and meaning of the law, but is oftentimes essential to an accurate knowledge of its scope and purposes, a brief review of those laws and customs upon which the American mining law is grounded, if not indispensable, will not be a waste of time. As said by Blackstone, "Surely no industrious student (or practitioner) will imagine his time misemployed when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is predicated; and that it is impracticable to comprehend many rules of the modern law in a scholar-like, scientific manner without having recourse to the ancient."[1]

§ 3. **Early traces of regalian right or ownership of mines.**— The principle of national ownership of mines, at least those of precious metals, has prevailed to a greater or less extent throughout all countries of which history speaks, and has been expressed in the larger portion of their legislation. And throughout the history of the mining law of many countries, the idea is kept uppermost and distinct that a mine is property separate from the soil which covers or incloses it; and that this property can enter into the private domain only in virtue of an act of the sovereign power, where alone rests the authority to dispose of it for the interests of society.[2]

[1] 2 Bl. Com., p. 44. [2] De Fooz, Mines, p. 14.

Among the Athenians the regalian right was exercised by the republic, which retained one twenty-fourth of the product of the mines of silver which it granted, and the working of which was under the surveillance of public officers.[1]

Among the Romans, mines in the conquered territories were worked by the generals or overseers of the emperors, on the condition of paying the sovereign a tenth of their product; the working being under the instruction of the Procurators Metallorum.[2]

§ 4. In Continental Europe.— The principle of regalian ownership pervades the entire system of the law in Continental Europe, with the single exception of Russia. It was so recognized from earliest times, and is protected in many of the countries by ordinances, themselves now ancient. It is admitted in Bavaria;[3] it pervades the entire system of Austro-Hungary, including Bohemia.[4] In Saxony[5] it was established by ordinance as early as 1589, and was established in many other of the German states in a similar manner, notably in Hanover.[6]

The Spanish government has always recognized the regalian right from the earliest period of history, both in making concessions and in causing certain mines to be worked on the state's account.[7]

The same is true with respect to the Prussian government, as it existed before its absorption into the German Empire, and it is so preserved in the institutions of that portion of Germany to-day. The land-owner could not prohibit authorized diggings. He was obliged, being indemnified therefor, under a system recognizing the mining industry as

[1] De Fooz, Mines, p. 14.

[2] Id.

[3] Ordinances of 1468; De Fooz, Mines, pp. 14–16.

[4] Ordinances of Marie Theresa, 1747; Ordinances of Joseph II., 1781; De Fooz, Mines, p. 15.

[5] Ordinances of 1589; De Fooz, Mines, p. 15.

[6] Ordinances of 1598; De Fooz, Mines, p. 15.

[7] De Fooz, Mines, p. 15; Gamboa, Com. Rockw. Transl., law IV, ch. 1, § 12.

a *quasi*-public use, to cede to the mine workers the land necessary for working the mines. And the state collected rents or indemnity for the expenses of surveillance and direction.[1]

In Sweden and Norway the mines are considered dependencies of the crown.[2]

In ancient France the king invested individuals with the right of working mines under the reservation of a portion of the products, either as a revenue to the state or to pay the expenses incurred for the service of mines, and this working was regulated by provisions of police.[3] This rule, in all its substantial features, prevails in the republic to-day.

§ 5. Russia excepted — Allodial title there.— It seems that Russia does not in name assume to exercise regalian control or ownership of mines. But, while this is the established policy, there is a system of taxation more rigorous and expensive than in any of the countries where regalian ownership is boldly asserted. In that country each proprietor is permitted to search for minerals; to work them, or to grant the property in them, or the right of working them, to others; the state, however, exercising direction over the working, and exacting and collecting exorbitant duties.[4]

[1] Ordinances of Frederick II., 1776, 1772–79; De Fooz, Mines, pp. 15, 16.

[2] Ordinances of 1480, 1685, 1757; De Fooz, Mines, p. 16.

[3] Ordinances of 1515, Law of July 12, 1791; Ordinance of March 21, 1781; Edict of 1604; De Fooz, Mines, pp. 24–25.

NOTE.—The law of France of 1810 is thus described by Fourcroy, one of its chief advocates: "The system of the law rests upon this principle, which is uniform with almost every people, that mines are public property, constituting a part of the national domain, and that they belong to the state, which causes them to be worked for its own account, or which grants them to individuals, to be worked by them under certain conditions." See De Fooz, Mines, pp. 37–38. Napoleon, however, arbitrarily and obstinately insisted, in the face of this law, that mines belonged to the owner of the surface, thus recognizing the allodial system; he was, however, outvoted in the contest, and in order to avoid the consequences of the edict, and the appearance of defeat, put forth this startling idea, that "mines are new property; that the right of working them forms a new wealth." De Fooz, Mines, p. 40.

[4] Ordinance of Catherine II., 1782;

Article B.

Of the Civil and Common Law.

§ 6. Of the ownership in mines under civil law.
7. The rule of the common law.

§ 6. Of the ownership in mines under civil law.— The continental systems were the outgrowth of the civil law, which, without exception, furnished the basis of the laws of nearly every country in Europe outside of Great Britain, and to some extent there. Naturally, therefore, their systems followed the principles of the civil law, by which it was established that the ownership of all lands was primarily vested in the state, and that all mines of gold or silver in public lands belong to the state or sovereign, as a part of the sovereign patrimony; whence it followed that the right of severance could be exercised, and the minerals granted to one and the land to another, or the land and minerals together. But in private lands, closely analogous to the rule of the common law, and probably the foundation of it, the minerals belonged primarily and *prima facie* to the owner of the soil, with this condition or limitation, similar to the rule prevailing in Russia, that if worked by the owner he was bound to render the tenth part to the sovereign as a right attaching to his crown; and if worked by another with the consent of the owner, there was a fixed and standing royalty of one-tenth to the crown and one-tenth to the owner.[1]

§ 7. The rule of the common law.— By the rule of the common law from the earliest time, *prima facie* and as a general rule, the owner of the soil owned all beneath it,

De Fooz, Mines, pp. 17, 18; Dig. Min. Stats (Skorof, Moscow, 1900), §§ 265–7, 417, 427, 418, 475. See Eng. Mag., Jan. 1902, p. 553, for abbreviated digest.

[1] Gamboa, Com., Rockw. Transl., ch. 2, sec. 1; Rockw. Spanish and Mexican Law, pp. 124–5; Gamboa, Com., Heathfield's Transl., p. 15; Lagunez, De Fructibus, 1, p. c. 10, n. 51; Rodgers, Mines, ch. 4; Lindl. Mines, sec. 11; Bainb. Mines, 1 Am. (from 3d London ed.), pp. 25–28.

with the limitation only,— the burden of showing which was upon the person attempting to rebut the presumption of ownership,— that "Royal Mines"[1] belonged to the crown or sovereign. By some of the earlier statutes and decisions there was some doubt as to what was included in the term "Royal Mines," the attempt being made to include copper and tin as well as gold and silver; and by others a distinction was sought to be made between the values of baser metals and those of gold and silver. This, however, was virtually settled by the statute of William and Mary,[2] by which it was ordained that the enjoyment of all mines in which tin, copper, iron or lead were found, notwithstanding any quantity of the precious metals intermixed, was secured to the subject.[3]

Article C.

Of Royal Mines.

§ 8. Royal mines — Earlier definitions.
9. The supposed origin of the right — Royal prerogative — Coinage.
10. Purpose of all this — Its application — Definition of mineral land — Cost of extraction.
11. Royal or sovereign rights in public reserves, streets and river beds.
12. Mines under the sea shore — High and low-water mark.
13. Traces of the assertion of royal ownership in early colonial grants.

§ 8. **Royal mines — Earlier definition.**— As indicated in the last section, there was originally some doubt and dispute as to what constituted or came under the nomenclature of Royal Mines. An accurate English writer thus reviews the subject: "According to the law of England, the only mines which are termed Royal, and which are the exclusive property of the crown, are mines of gold and silver. . . . It

[1] See *infra*, this chapter, art. C.

[2] Statute 1 Wm. & Mary, ch. 30; 5 Wm. & Mary, ch. 6; Coll. Mines, p. 2. See also Vice v. Thomas, Stan., p. 85; 2 Bl. Com., p. 18; 1 id. 294; Bainb. Mines, 1 Am. (from 3d London ed.), p. 24; Rodgers, Mines, ch. 4; Lyddal v. Weston, 2 Atk. 20; Seaman v. Vaudrey, 16 Ves. 293; McSwinney, Mines, p. 26, 27; Lindl. Mines, § 2.

[3] 1 Wm. & Mary, ch. 30; 5 id., ch. 6; Collier, Mines, p. 2.

seems formerly to have been a matter of considerable dispute as to what constituted a royal mine. By some it was considered to be a principle of the common law that, if any gold or silver was found in metals of a baser nature, there was sufficient to bring the mine within the definition of a royal mine; while by others a mine was not to be deemed royal unless the quantity of gold or silver exceeded in value that of the other metals with which it was mixed. The latter opinion was adopted by three of the judges, viz., Harper, Southcott and Weston, in the case of the Queen and the Earl of Northumberland, although they agree in thinking that, as the defendant in that case had confessed the production of some royal ore, he was concluded by his not having proceeded to show the relative difference of value, and that the mine must therefore be presumed to be royal. But all the other nine judges were of opinion that the existence of any portion of gold or silver was sufficient to constitute a royal mine. Plowden himself contends that if the royal metals should bear the expenses of extraction, the whole should belong to the crown, and if otherwise, to the owners of the base metals. This decision occurred in the time of Queen Elizabeth, when the prerogative of the crown was perhaps at its greatest height, and the opinion of the nine judges does not appear to have gained the acquiescence of more recent lawyers."[1] But, as we have seen,[2] this early claim and doctrine was overthrown by statute, which brushed away all doubt as to what constituted a royal mine, by which statute it was enacted that no mines of copper, tin, iron or lead should be looked upon as royal mines, notwithstanding gold or silver might be extracted from them in quantity.[3] Thus we see that from that time, at least, only those mines

[1] Bainb. Mines, 1 Am. (from 3d London ed.), ch. 2, sec. 8, pp. 24–27, citing Queen v. Earl of Northumberland, Plowd. 336; 2 Coke, Inst. 577-78.

[2] *Ante*, § 7.

[3] 1 Wm. & Mary, ch. 30; 5 id., ch. 6; Collier Mines, p. 2; B. & W. Lead. Cases, p. 83.

are to be considered as royal which contain gold and silver, or either one alone.[1]

§ 9. The supposed origin of the right — Royal prerogative — Coinage. — English writers and English courts are hardly agreed as to the reason for the royal right asserted to mines; the reasons given being, variously, in virtue of prerogative,[2] the king's right of coinage,[3] and the excellence of the thing.[4] It was considered so closely allied to or connected with the royal prerogative, at least by early writers and in early cases, that it was thought that though the king grant lands in which mines are, and all mines in them, yet royal mines would not pass by the grant.[5] This prerogative is said to have originated, as above observed, in the king's right of coinage, in order to supply him with materials.[6] But the right of coinage in the earlier periods of European history was not always exercised by the crown, and the same reason might apply to other metals, such as copper and tin.[7]

The reason assigned by writers who place this right upon the "excellence of the thing"[8] is the puerile apology of the sycophant, and would scarcely be made by an English judge or writer of the twentieth century. But since the royal prerogative in England, under the early common law, was an arbitrary power to do good and not evil,[9] and since it was a fiction of the law that the king could do no wrong, it would seem that the act of seeking the further

[1] Collier, Mines, pp. 2–3; Lindl. Mines, p. 2; 1 Bl. Com. 294.

[2] 1 Bl. Com. 294; Collier, Mines, p. 1; 2 Co. Inst. 577; Bainb. Mines, p. 24; McSwinney, Mines, p. 26; Rockw. Span. and Mex. Law, p. 514.

[3] 1 Bl. Com. 294; 2 Co. Inst. 577.

[4] Plowd. 81, 310. See also Pettus, Fodinæ Regales; Collier, Mines, p. 1; Queen v. Northumberland, Plowd. 336.

[5] Plowd. 336.

[6] See *post*, § 11, note 4; 1 Bl. Com. 294.

[7] Bainb. Mines, p. 24; Plowd. 338, 339; Rockw. Span. and Mex. Law, p. 515.

[8] Plowd. 81, 310.

[9] Rutherforth, Inst. 279; Co. Lit. 90; Chitty, Prerogative; Bacon, Abr., title Prerogative; Bouvier's Law Dict. 15, title Prerogative.

excuse for the exercise of this function than that of prerogative is one of supererogation.[1]

§ 10. Purpose of all this — Its application — Definition of mineral land — Cost of extraction. — The value of the foregoing observations, independent of any question of historical importance, or of the fact of containing the foundation of present mining jurisprudence, is enhanced by the circumstance of its similarity in many respects to the provisions of our own statute, and the rulings thereunder, as to what constitutes "known mines." Thus, as we have seen, at the common law certain mines were considered royal mines, or the contrary, according to the presence or absence of gold and silver in paying quantities. So, under the statute, before a lead, lode or vein is considered to be a mining claim within the meaning of the statute, or before the land is considered mineral land,[2] it must contain minerals in sufficient quantities and value to justify their extraction.[3] So, at the common law, as laid down in an early case,[4] it was said in effect that if the gold and silver did not repay the charges of separation, those metals were not considered as belonging to the crown under the rule. But it would appear that if the royal metals had been found in a pure state, and unmixed with ores of any baser metal, or if the mixture had

[1] See last preceding note. Mr. Rockwell, quoting from Bainbridge, says: "Whatever reason may be assigned for the right of the crown, and whatever value that right may be, it has long been decided, not only that all mines of gold and silver within the realm, though in the lands of subjects, belong exclusively to the crown by prerogative, but that this right is also accompanied with full liberty to dig and carry away the ores, and with all other incidents thereto as are necessary to be used for getting them." Rockw. Span. and Mex. Law, p. 515; Bainb. Mines, p. 25. See as to right of removal, Lyddal v. Weston, 2 Atk. 20; Seaman v. Vaudrey, 16 Ves. 393. See also *post*, Part XII, chs. I–V.

[2] See *post*, Part III, ch. I.

[3] Aspen Cons. M. Co. v. Williams, 23 L. D. 84; Goldstein v. Juneau Townsite, id. 417; Phifer v. Heaton, 27 L. D. 57; Coleman v. McKenzie, 28 L. D. 348.

[4] Queen v. Earl of Northumberland, Plowd. 336.

been simply mechanical and not chemical, and the precious metals could have been extracted without necessarily submitting the whole mass to the ordinary smelting process used in the reduction of inferior metals, the mine would have been considered a royal mine without reference to the cost either of reduction or separation.[1]

§ 11. Royal or sovereign rights in public reserves, streets and river beds.— It would seem beyond dispute that sovereign ownership and right of disposition exist with reference to all minerals and mines in all public reserves and reservations,[2] and in other public lands, streets and river beds.[3] In England it would seem, where the right of removal could not be disputed, either for the reason of the reservation carrying with it the right or the possible exercise of the royal prerogative, this right would extend still further and be assertable in many customary and copyhold lands.[4] Of course, in this country the right of disposition of public lands, either as mining claims or otherwise, while it exists as an attribute of sovereignty, can only be exercised in pursuance of a statute enacted to authorize and regulate such disposition.

§ 12. Mines under the sea shore — High and low-water mark.— The question as to the title to alluvial lands is one

[1] "Pay ore" and "paying quantities" relative terms. Golden Terra M. Co. v. Mahler (Dak., 1879), 4 Morr. M. R. 390.

[2] See *post*, Part IV, chs. III, IV.

[3] 1 Bl. Com. 294, 295; Hal. Int. De Fooz, sec. 10; Wheat. Elements of International Law, Part I, ch. II, sec. 5; Pollock & Maitland's Hist. Eng. Law, vol. I, Book 2, ch. II, sec. 13, pp. 495, 503.

[4] See *post*, this chapter, art. E. A grant of waste lands in the province of Victoria, under imperial statute 5 & 6 Vict., ch. 36, and before the passage of the imperial statute 18 & 19 Vict., ch. 55, does not transfer to the grantee the gold and silver that may be found under such lands. Wooley v. Attorney-General Victoria, 2 L. R. App. Cas. 165, 46 L. J. 18. So a grant of lands by the crown, including various minerals, oil, etc., but not specifying gold in express terms, will not operate to convey the gold or other precious metals held by the crown under its prerogative. Esquimalt & Nanimo Ry. Co. v. Bainbridge, (1896) App. Cas. 561.

not yet thoroughly settled in this country or in England; the prevailing opinion being that the mines, at least where the sovereign right can be exercised, would belong to the *king*, and in this country to the state or the United States, as the case may be.[1] But as to ordinary alluvium, of course the rule is otherwise, and the mineral goes to the adjoining proprietor.[2] And a grant by letters patent, by the crown as lord of the manor, of "all coal mines found or to be found within the commons, waste grounds or marshes of the manor," with the proviso that the grant should be construed strictly against the crown, and most strictly and beneficially for the grantees, was held to pass coal under the foreshore of an estuary of a river, between high and low-water mark, on the sea shore and forming a part of the manor.[3] But land above the high-water mark does not belong to the crown.[4]

§ 13. Traces of the assertion of royal ownership in early colonial grants.— In many of the royal grants to the colonies forming the original thirteen states, there was reserved a fixed proportion of all the royal metals discovered, ranging from one-fifth to one-fourth, as a general rule, but sometimes a fixed sum. Mr. Lindley, in his recent work on Mines, has accurately collected the substance of these charters, and states them as follows: "The charter of North Carolina (1584), granted to Sir Walter Raleigh by Elizabeth, contained the following reservations: 'Reserving always to us, our heirs and successors, for all services, duties and demands, the fifth part of all the ore of gold and silver that from time to time and at all times, after such discovery, subduing

[1] Hale, De Jure Maris, chs. 4, 5, 6; Constable's Case, 5 Rep. 107; Blanch. & Weeks' Leading Cas., p. 46. See Co. Lit. 261*a*, note 205.

[2] Bract., Book 2, ch. 32; Hale, De Jure Maris, p. 28; 2 Bl. Com. 261; Callis, p. 51; Com. Dig., title Prerogative, p. 61; 2 Roll. Abr. 170; In re Hall & Selby Ry. Co., 5 M. & W. 321; Scratton v. Brown, 4 B. & C. 485; Ford v. Lacy, 30 L. J. Exch. 351, 7 H. & N. 151; Gifford v. Yarborough, 5 Bing. 163, 3 B. & C. 91.

[3] Attorney-General v. Hanmer, 27 L. J. Ch. (N. S.) 837, 6 W. R. 804.

[4] Lowe v. Govett, 3 B. & Ad. 863.

and possessing, shall be there gotten and obtained.'[1] This form of reservation is found with few exceptions in all the succeeding grants, viz.: the three charters in Virginia (1606–1609–11),[2] which also reserved one-fifteenth of all copper; Massachusetts Bay (1629);[3] the grant of New Hampshire, by president and council of New England, to Captain John Mason (1629), confirmed 1635;[4] the charter of Maryland to Lord Baltimore (1632), upon whom was imposed the additional burden of rendering annually two Indian arrows;[5] the grant of the province of Maine to Sir Ferdinando Gorges (1639);[6] Rhode Island and Providence Plantations (1643);[7] Connecticut (1632).[8] The charter of Carolina, granted by Charles the Second to the Earl of Clarendon, Duke of Albermarle and others (1663–65), reserved a royalty of one-fourth of the royal metals, and the annual payment of twenty marks.[9] The grant of the province of Maine by Charles the Second to James Duke of York (1664) was an exception.[10] In this grant, 'Our dearest brother covenants and promises to yield and render to his sovereign annually forty beaver skins when they shall be demanded,' and in return received a grant of all the mines and minerals. William Penn was required to yield and pay 'two beaver skins to be delivered at our Castle of Windsor on the first day of January of every year,' in addition to the one-fifth part of all gold and silver ores."[11]

Article D.

Of the Sovereign Authority in the United States.

§ 14. Introductory.

15. Analogous sovereign rights in the United States and the several states — Ownership of minerals under streets, river beds and road beds.

16. No regalian right in the United States — Distinction between regalian right and sovereign control.

[1] Charters & Const., Part II, p. 1880.

[2] Id., Part II, pp. 1890, 1898, 1904.

[3] Id., Part. I, p. 932.

[4] Id., Part II, pp. 1271–74.

[5] Id., Part I, p. 812.

[6] Id., Part I, p. 776.

[7] Id., Part II, p. 1602.

[8] Id., Part I, p. 257.

[9] Id., Part II, p. 1383.

[10] Id., Part I, p. 784.

[11] Lindl. Mines, sec. 31, pp. 37, 38.

§ 14. Introductory.— In the United States there are at least two independent systems of sovereignty which may be exercised in respect of mines and mineral lands, namely: that of the original thirteen states, and of the other states in respect to state lands, and that of the United States or federal government over the portion of the United States acquired by purchase other than as embraced in the first thirteen states and the states carved out of territory belonging to them. The state lands proper are again divided into at least two systems: those which belong to the original thirteen states, over which the federal government never had any natural or original jurisdiction as owner of the soil, and those embracing territory of the United States as acquired afterwards. In the former there are traces of rights dependent upon colonial grants, which were mentioned in the last preceding section, and which will be referred to specifically wherever necessary herein.

§ 15. Analogous sovereign rights in the United States and the several states — Ownership of minerals under streets, river beds and road beds.— The sovereign power and authority which every nation has over the lands and property belonging to it are expressly recognized in the federal constitution, and conferred upon the congress of the United States.[1] Having this power conferred upon it by the constitution, it necessarily follows that congress also has the power to fix the rules and laws by which it will dispose of the mineral lands of the United States,[2] and whether it will segregate the minerals or dispose of the land and minerals together, or adopt the system of royal claim, or withhold them altogether. With few exceptions, which will be noticed in the part of this work treating of patents,[3] the United States parts with the fee absolutely, and of course in such

[1] Const. U. S., art. IV, sec. 3; United States v. Gratiot, 14 Pet. 526, 10 L. ed. 573; United States v. Gear, 3 How. 120, 11 L. ed. 523.

[2] Black v. Elkhorn M. Co., 52 Fed. Rep. 859.

[3] *Post*, Part X, ch. V; Boggs v. Merced M. Co., 14 Cal. 279.

case its grantee gets the minerals, subject to the easement or estate, in certain cases elsewhere shown,[1] of the right of an adjoining proprietor to penetrate his ground in following the vein on its downward course.

Manifestly, in the United States, the same doctrine must apply, as to all lands occupied as public streets, which obtains in England. And in such case, where the title has never passed from the United States or the state, as the case may be, the minerals under the street must belong to the state or United States in virtue of its sovereignty. Where, however, the ultimate fee of the street or road-bed, as the case may be, is in a proprietor other than the occupant, it would follow that the owner of the fee in all cases would own the underlying mines.[2] And as to mines beneath navigable river beds, there is undisputed authority from very early times that they belong to the sovereign.[3] There are cases authorized by law, which are fully considered elsewhere in this work, where minerals are reserved out of a patent granted by the United States.[4] But the United States parts with the title to mineral lands as such in only one way.[5]

§ 16. No regalian right in the United States — Distinction between regalian right and sovereign control. — A distinction exists, and should be observed, between ultimate

[1] *Post*, Part XI, ch. I.

[2] Bl. Com., p. 18, vol. 2; Shep. Touch., p. 90; Broom, Leg. Max., p. 395; Rush v. French, 1 Ariz. 99, 25 Pac. Rep. 816.

[3] 2 Bl. Com., p. 18. See also Grand Rapids Ice & C. Co. v. South Grand Rapids Ice Co., 102 Mich. 227, 60 N. W. Rep. 681; Pittsburg & L. A. I. Co. v. Cleveland Iron M. Co. and Lake Superior Iron Co., 118 Mich. 109, 76 N. W. Rep. 103; s. c., dismissed for want of jurisdiction, 178 U. S. 270.

[4] Davis v. Weibbold, 139 U. S. 507; Colorado C. & I. Co. v. United States, 123 U. S. 307; Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; Samuel W. Spong, 5 L. D. 198; Cleghorn v. Bird, 4 L. D. 478; Kings County Com'rs v. Alexander, 5 L. D. 125; Dughi v. Harkins, 2 L. D. 721. See also *post*, Part X, ch. VI.

[5] Deffeback v. Hawke, 115 U. S. 392; Steele v. St. Louis S. & R. Co., 106 U. S. 449; Witherspoon v. Duncan, 4 Wall. 218; Davis v. Weibbold, *supra*.

ownership and right to govern, on the one hand, and the exercise of regalian right, after possession and title is parted with, on the other. The former exists in the United States, the latter does not.[1] The ownership, as well as the manner of exercising control, of mineral lands, is regulated in the United States by statute.[2] Nothing contained in this section or the two preceding it should be so construed as to indicate the existence of a policy on the part of the United States to reserve the minerals out of any grant except as authorized by statute, or in pursuance of colonial grants containing provisions in the nature of covenants running with the land.[3] Neither regalian right, nor anything similar, has ever existed in or been asserted by the United States. While it has sovereign authority, and the power to enact such statutes as congress in its wisdom sees fit, within the limits of the constitution, its right is dependent upon and controlled entirely by statute.[4]

Article E.

Of the General Nature of the Tenure of Mineral Lands Other Than Royal Mines—And Herein of Allodial Title, and of Customary Lands—Likewise the Early Laws and Policy of the States.

§ 17. Limitations in England upon regalian right, or as to royal mines—Customary and copyhold lands.
18. Copyhold lands—Minerals not generally distinct from inheritance.
19. Custom against royal mines in Cornwall and Devon—Early statutes against.
20. Recent acts—Enfranchisement of copyhold lands.
21. Right of entry into reserved mines.
22. Similarity to feudal tenure as to mines.
23. Feudal tenure.

[1] See authorities cited *ante*, § 15, p. 14, notes 4 and 5. See also United States v. Parrott, 1 McAll. 271, 27 Fed. Cas. 416 (No. 15,998); Glenn v. United States, 13 How. 260; Lee Doon v. Tesh, 68 Cal. 48, 8 Pac. Rep. 631; United States v. Castillero, 2 Black 1.

[2] Lee Doon v. Tesh, *supra;* Weeks, Mineral Lands, § 2; United States v. Parrott, *supra;* United States v. Gear, 3 How. 119.

[3] United States v. Castillero, *supra; ante*, § 14.

[4] See authorities cited to note 1, *ante*. See also § 15 and notes, *ante*.

§ 24. Examples of sovereign authority asserted by the states.
25. The allodial system of title prevails throughout this country.
26. Allodial title in Mexico.

§ 17. Limitations in England upon regalian right, or as to royal mines — Customary and copyhold lands. — It is well settled that certain copyhold and other customary lands in England are exempt from the general operation of the common-law rights and obligations, and are controlled solely by customs of the manor and the judgments of courts, a copy of which furnishes the paper title of the copyholder.[1] And in the absence of special customs to the contrary, the right of property in minerals, in copyhold and customary lands, is vested in the lord of the manor, and the mineral right is vested in the tenant. Consequently, in such cases, neither the lord nor the tenant can exercise any right to work them without mutual consent;[2] and there are cases which hold that this right in the copyholder is exclusive.[3]

It has been said that the lord of the manor may claim minerals against the crown, a copyholder as against the lord of the manor, and even commoners may have the right to dig gravel, but, it seems, not to take mineral to the exclusion of the lord.[4] But a custom to take one sort of minerals is no evidence of a custom to take any other sort.[5]

[1] 2 Bl. Com. 99, 100, 149; Pollock & Maitland, Hist. Eng. Law, vol. 1, pp. 342, 384, 387; Co. Inst. 59*b*, Law 1, ch. 9; Bainb. Mines, 1 Am. (from 3d London ed.), ch. 2, § 1; 1 Am. ed., p. 4, note; Id., pp. 88, 112; Collier, Mines, p. 79, § 5; Earl of Cardigan v. Armitage, 3 B. & C. 158.

[2] Scriven, Copyholds, p. 509; Bourne v. Taylor, 10 East, 189; Rutland v. Green, 1 Ken. 57, 1 Sid. 152; Player v. Roberts, W. Jones, 248; Gilbert, Tenures, 327; Co. Inst. 62*a*, Law 1, ch. 10, § 80; Bishop of Winchester v. Knight, P. Wms. 406, per Lord Kenyon; Townley v. Gibson, 2 T. R. 704; Whitechurch v. Holworthy, 19 Ves. 214, 4 M. & S. 304; Gray v. Northumberland, 13 Ves. 236, 17 id. 281. See also Lewis v. Branthwaite, 2 Barn. & Ad. 437; Mitchell v. Dors, 6 Ves. 147.

[3] Bowser v. McLean, 2 De Gex, F. & J. 415, 30 L. J. Ch. 273; Greathead v. Morley, 3 M. & G. 139, 10 L. J. (N. S.) C. P. 246.

[4] Crown v. Lord Yarborough, 3 B. & C. 91, 5 Bing. 163; Roe v. Brenton, 8 B. & C. 766, 3 Man. & Y. 133; Hayden v. Smith, 13 Co. 68; Hoskins v. Robbins, 1 Mod. 74; Potter v. North, 1 Ventr. 123; North v. Coe, Vaugh. 251.

[5] Curtis v. Daniel, 10 East, 278.

§ 18. Copyhold lands — Minerals not generally distinct from inheritance. — Certain rights have grown out of custom in parts of England, relative to copyhold lands, which create a well-defined distinction between them and ordinary public lands or crown lands. With reference to copyhold lands, it may be said that when the minerals contained therein belong to the lord of the manor they do not form an inheritance distinct from the freehold, but are a part of the demesne of the manor; and in the grant of wastes, or in the enfranchisement of copyhold lands, the mines and minerals will not be reserved by the common reservation of all seigniories, royalties and jurisdictions. The minerals must be mentioned in express terms, or they will become the property of the owners of the surface, and part of the same inheritance.[1] But a copyholder may, by custom, acquire the right to take and use minerals.[2]

So it is that by presumption of law the lord of the manor is entitled to the exclusive property in the soil of all common and waste lands of the manor, and, consequently, to all mines and minerals therein.[3]

§ 19. Custom against royal mines in Cornwall and Devon — Early statutes against. — Thus it is that in consequence, perhaps, of the abuse of the royal prerogative, certain customs from small beginnings had grown up, whereby certain lands, denominated customary and copyhold lands, not all copyhold lands, however, had become exempt from the operation of the royal prerogative, and in the counties

[1] Bainb. Mines (1st Am. ed.), p. 6 and note; Townley v. Gibson, 2 T. R. 701.

[2] Hayden v. Smith, 13 Co. 68, Godb. 173; Stephenson v. Hill, 3 Burr. 1278; Doe v. Huntington, 4 East, 271; Brown v. Rawlins, 7 East, 409; Duke of Portland v. Hill, 35 L. J. 439, L. R. 2 Eq. 765.

[3] Dallas' Notes to Bainb. Mines (1st Am. ed.), p. 7. See also Bolton v. Lowther, 2 Dick. 677; Horcy v. Hagberton, Cro. Jac. 229; Cooper v. Marshall, 1 Burr. 265; Sadgrove v. Kerby, 6 T. R. 486; Filewood v. Palmer, Mos. 169, 5 Vin. Abr. 7; Rogers v. Taylor, 1 H. & N. 828; Arlet v. Ellis, 7 B. & C. 336; Potter v. North, 1 Saund. 347; Hoskins v. Robbins, 1 Mod. 74; Co. Lit. 122*a*; Kentick v. Pargiter, Cro. Jac. 208; Douglass v. Kendall, Yelv. 256.

of Cornwall and Devon particularly, these customs had become immemorial; and with reference to mines and minerals therein it could not be exercised.[1]

The expansion, too, of the claim of prerogative, extending, as we have shown, in some cases to other minerals, and to mineral ores containing other than the royal metals, provided the royal metals were also found therein in quantities to justify working, led to the organization in the time of Queen Elizabeth of a society having for its purpose the restriction by statute of the royal prerogative and of the management of royal mines. It gave the crown, or those claiming under it, a pre-emption right of purchase of minerals at fixed rates, within a specified time, otherwise the right was defeated. It was expressly provided that it should not interfere with the rights of the tinners of Devon and Cornwall. Mr. Bainbridge, speaking of this statute, says: "It should be observed, in the first place, that the right of the crown to all mines of gold and silver in which the ores of those metals are found, in connection with other substances than copper, tin, iron or lead, remains unaffected by these statutes. And that the presence of any of the four metals just mentioned would seem to be sufficient to protect the ore against the claims of the crown."[2]

§ 20. Recent acts — Enfranchisement of copyhold lands. While there have been several acts of parliament during the reign of Queen Victoria for the avowed purpose of enfranchising copyhold lands,[3] it is a noteworthy feature in them all that so firm has the customary right become fixed in

[1] Bainb. Mines (1 Am. from 3d London ed.), p. 30; Doe v. Huntington, 4 East, 271; Collier, Mines, pp. 3, 4; Gilbert, Tenures, 327; Brown v. Rawlins, 7 East, 409; Rutland v. Green, 1 Keen. 507; Bourne v. Taylor, 10 East, 189; Winchester v. Knight, 1 P. Wms. 406.

[2] Bainb. Mines, pp. 34-36.

[3] 4 & 5 Vict., ch. 35, §§ 39, 82, 84; 14 & 15 Vict., ch. 95, referring to High Peak Mining Customs and Mineral Courts Act, 15 & 16 Vict., ch. 51, § 48; Derbyshire Customs and Mineral Courts Act, 21 & 22 Vict., ch. 94; 24 & 25 Vict., ch. 40; 32 & 33 Vict., ch. 19.

English mining jurisprudence, that, without any exception, provision is made protecting the customary rights to the mines.[1]

§ 21. Right of entry into reserved mines.— While the discussion of incidental rights resulting from severance of mines from the surface is mainly postponed to a further part of this work,[2] the subject in hand, being one incident to the royal right, is proper to be considered here. Thus, by an early authority, Lord Hardwicke is said to have rendered the opinion that there was by the terms of the grant no power of entry reserved to the crown, and certainly none was implied.[3] This opinion, however, stands alone. And, following the general rule that a grant or reservation carries with it the necessary means of extracting the minerals, the right was declared to exist by all the twelve judges in the celebrated case in Plowden, afterwards upheld by Sir William Grant, M. R., and followed in other cases.[4] And it has been held that this right may be exercised to the extreme extent of authorizing the galees of lower veins of coal to sink shafts through the upper veins of a prior galee for the purpose of working out the coal.[5]

Mr. Collier, upon the indisputable proposition that a tenant, not possessing the property in minerals, cannot open them without committing waste, though he may dig an open one,[6] argues that it follows that the right of entry must be reserved or it does not exist,— citing a large number of cases.[7] He then proceeds to say: "The reversioner, or lord

[1] Bainb. Mines (1 Am. from 8d London ed.), p. 7; Kerr v. Pauson, 25 Beav. 394, 27 L. J. Ch. 594.

[2] *Post*, Part XII, ch. V, art. C.

[3] Lyddall v. Weston, 2 Atk. 20; Bainb. Mines, p. 26.

[4] Bainb. Mines, pp. 25–27 (1st Am. ed.), p. 33; Queen v. Earl of Northumberland, Plowd. 310–36; Seaman v. Vaudrey, 16 Ves. 393; Collier. Mines, p. 1; Cullen v. Rich, Bull, N. P. 102, 2 Str. 1142.

[5] Goold v. Great Western Deep Coal Co., 2 De Gex, J. & S. 600, 11 Jur. (N. S.), 865.

[6] Co. Lit. 53*b*, 54*b*; Astray v. Ballard, 2 Mod. 193; Manwood's Case, Moore, 101; Gilbert, Tenures, p. 327; Doe v. Huntington, 4 East, 271; Bourne v. Taylor, 10 East, 189.

[7] See authorities to note 6, *ante*. See also Brown v. Rawlins, 7 East, 409; Bishop of Winchester v. Knight, P. Wms. 407.

of the manor, cannot enter and dig because he has not the possession of the surface, or even of the sub-soil."[1] All of which is correct; but it sticks in the bark as to the real proposition, which is that where there is a grant, a reservation, or a custom fixing the right, all the means necessary to enjoy it are, as a general rule, incidents.[2]

§ 22. **Similarity to feudal tenure as to mines.**— In some parts of England, notably wherever the customary tenure has prevailed, the tenure of some mines, as well as the mode of exacting compensation, resembles in some degree the old feudal system in its application to ordinary real estate. In both cases there was duty or service due to the lord by custom; often pay or royalty was delivered in kind, and the right descended to the heir or executor.[3]

§ 23. **Feudal tenure.**— The remarks in the last section are aptly illustrated by the following extract from a late work: "To say of a tenant that he holds in fee (*tenet in feodo*) means no more than that his rights are inheritable. He does not hold for life, he does not hold for a term of years, he does not hold as guardian of an heir, or as one to whom the land has been gaged as security for money; he holds heritably and for his own behoof. But nothing is implied as to the terms of his holding — the relation between him and his lord. His duty to his lord may be onerous or nominal, noble or humble, military or agricultural; but if his rights are heritable, then he holds in fee and the land is *feodum suum*. . . . It is clear then that of dependent or feudal tenure in general little can be said: but still some analysis of it is possible. We may at least notice that it seems to be a complex of personal rights and of real rights. On the one hand, the lord has rights against his tenant, the ten-

[1] Collier, Mines, p. 8; Lewis v. Braithwaite, 2 Barn. & Ad. 437.

[2] See note 4, p. 19, *ante*, this section.

[3] McSwinney, Mines, 431, 432–33; Bainb. Mines (1st Am. from 3d London ed.), pp. 63, 64; 4th ed., p. 149; Darcy v. Asquith, Hobart, 234; Arlet v. Ellis, 7 B. & C. 346; Glover v. Lane, 3 T. R. 446.

ant has rights against his lord; the tenant owes service to his lord, the lord, at least normally (nominally), owes defense and warranty to his tenant. On the other hand, both lord and tenant have rights in the land, in the tenement, the subject of the tenure." [1]

Thus it is that in this principle of feudal tenure, coupled with the customs of the copyhold lands, we have the fundamental elements which compose the estate acquired by the miner in the public lands of the United States by location; the duty, burden or service being cast upon him there to improve the land a fixed amount at least each year.[2]

§ 24. Examples of sovereign authority asserted by the states. — It is manifest from the foregoing, when the principles which control are accurately understood, that the doctrine of sovereign control of mineral lands lies at the very root of state authority within the first thirteen states of the United States, and with reference to the federal government, as to all lands acquired by it. Whence it follows that wherever that authority has been asserted by either a sovereign state or the United States, the power is well claimed and may be lawfully asserted.

This authority and right were early asserted, both by statute and decision, in the state of New York; [3] but seem not to have been asserted, perhaps for want of occasion, for

[1] Pollock & Maitland, Hist. Eng. Law, vol. I, pp. 213–15. See also 2 Bl. Com., pp. 44–50.

[2] See *post*, "Annual Labor and Assessment Work," Part VII, chs. I and II.

[3] New York Const. 1848, art. I, sec. 2; N. Y. Rev. Stat. (3d ed.) 322; Laws 1894, vol. I, ch. 317, p. 589; Jackson v. Ingraham, 4 Johns. 163; Jackson v. Waters, 12 Johns. 365. The matter is now regulated by statute. See Appendix B, §§ 80 *et seq.*

NOTE. — In Michigan the sovereign right of the people to mines of gold and silver has been asserted from very early times. Act 78, Laws 1848, p. 92; Compiled Laws (Mich.) 1897, § 1526. But inasmuch as the territory was acquired by the United States and became a public-land state, this would be of meagre application if not an erroneous assertion of authority. No case seems to have called it in question in the courts. See R. S. U. S., § 2345.

many years until recently.[1] The power was incidentally mentioned by the supreme court of the United States,[2] and was claimed to underlie the policy of the state of Georgia, to the extent that it was decided that if a state made a grant of public lands to an individual, without any exception of the mines and minerals, both would pass to the grantee as part and parcel of the land.[3] This principle was recognized in an early case in California,[4] and except that the learned court overlooked the distinction between a sovereign state and its rights to state land, on the one hand, and territory belonging to the United States, on the other, the underlying principle was well asserted, and the reasoning of the court unassailable, notwithstanding it has received much adverse criticism.[5]

§ 25. The allodial system of title prevails throughout this country.— All lands containing mines or minerals in this country, acquired from individuals holding the fee simple, must of necessity be acquired by contract, except in

[1] Moore v. Brown, 139 N. Y. 127, 34 N. E. Rep. 772, where mines were asserted to be the property of the people.

[2] Fremont v. United States, 58 U. S. 442. See also United States v. Castillero, 2 Black, 1, 371.

[3] State of Georgia v. Canatoo, a Cherokee Indian, reported in National Intelligencer, Oct. 24, 1843; 3 Kent, Com. 378, note.

[4] Hicks v. Bell, 3 Cal. 219.

[5] Mr. Gregory Yale thus comments on this case of Hicks v. Bell: "Our supreme court grappled with the question at an early day, by anticipation, if not by inspiration, in announcing that the state owned the mines of gold and silver on the public lands by virtue of her sovereignty, and has, solely, the right to authorize them to be worked, and to pass laws for their regulation, and fix such terms and conditions to the freedom of their use as she deems proper." Yale on Mining Claims and Water Rights, p. 27. In a later case the court pursued the question still further and held that the state also owned the mines of gold and silver in the lands of private individuals, but for the want of legislation had not the power to authorize the invasion of such lands to work them. Stokes v. Barrett, 5 Cal. 36. But this doctrine was virtually abandoned in Merced Mining Co. v. Fremont, 7 Cal. 317, and in Biddle Boggs v. Merced M. Co., being the same case under another name, 14 Cal. 279. And it was finally abandoned in Moore v. Smaw and Fremont v. Flower, 17 Cal. 199.

those states where mining is held to be a public use for certain purposes and the doctrine of eminent domain is spread over it. But there is no recognition of the doctrine that the minerals, independent of the land, belong to the sovereign power. The common-law doctrine prevails,— that he who owns the soil owns all above and beneath it, assuming that the estate is in fee simple and is unsevered, as hereinafter adverted to;[1] and minerals, in their natural condition, are a part of the soil.[2] A patent from the United States, a conveyance from a state or an individual of lands owned by either, carries with it the minerals therein, unless they are expressly reserved by the terms of the grant, or have been previously granted.[3]

§ 26. Allodial title in Mexico.— While there were many features of the older Mexican law which preserved the essential elements of the regalian right, there was likewise a system of concession which in its practical effect operated to establish all the essential elements of an allodial ownership of the mines in him who owned or had the possession of the soil; that is, the concession could be, and generally was, so framed that the two rights ran together.

The regalian right does not necessarily imply that the absolute property of mines, with full power of disposition, is primarily in the state; the theory of that right is equally consistent with the doctrine of the French law of 1810, that

[1] See *post*, Part XII, ch. IV. *Cujus est solum ejus est usque ad coelum* is the maxim of the law, and controls everywhere except where limited by grant, reservation or statute. See Broom, Leg. Max., pp. 395–397: 1 Co. Inst., p. 4*a*; 2 Bl. Com., p. 18; Alloway v. Wagstaff, 4 H. & N. 307; Bainb. Mines, p. 4; 2 Washb. Real Prop., § 3, subd. 62; 3 Kent, Com. 378; McSwinney, Mines, p. 26; United States v. Parrott, 1 McAll. 271, 27 Fed. Cas. 416 (No. 15,998); Lee Doon v. Tesh, 68 Cal. 48, 8 Pac. Rep. 621–624; Ah Hee v. Crippen, 19 Cal. 491; Boggs v. Merced M. Co., 14 Cal. 279; Stratton v. Lyons, 53 Vt. 641; Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104.

[2] Stratton v. Lyon, *supra;* Adam v. Briggs Iron Co., 7 Cush. 631; La Custrine Fertilizer Co. v. Lake Guano & Fertilizer Co., 82 N. Y. 476.

[3] Moore v. Smaw, 17 Cal. 199; 3 Kent, Com. 378, note b.

a new property is created, or one previously dormant is brought into life and activity by the concession. In either view of the question, the regalian right is regarded as remaining in the state, while the right of property is vested by the concession in the grantee.

"In Spain and Mexico, the property of the subject or citizen, whether in the surface or in minerals under the surface, is allodial, and he is considered as seized thereof *in dominio suo* in his own demesne. Nevertheless, the crown or state, in conferring upon the grantee this allodial title of property, ownership or demesne in the mine, retains over the mine so conceded its *jura regalia*, or the regalian right to receive a portion of the product, to watch over and direct the working, and, in case of forfeiture, to re-grant this property to others upon the terms and conditions which it may see fit to impose." Senor Gamboa, in his commentaries upon the new recompilation, 1759, was of the opinion that although the laws granted the dominion and property (*dominio y propriedad*) to subjects, yet the transfer was not absolute because the eminent domain still remained in the king. His views were incorporated into the mining ordinances of 1783, and the theory of those ordinances has been accurately summarized and stated as follows:

"1. The mines belong to the crown by virtue of its regalian right.

"2. The right of property in them is vested in the grantee by the concession.

"3. That this concession does not deprive the crown of its regalian right of eminent domain over them.

"4. That this grant is a gift, with a charge to do certain things specified in the laws.

"5. That on a failure to comply with certain provisions of law, the right of property so vested in the grantee shall be forfeited, and the mines become grantable to others."[1]

[1] Blanch. & Weeks, Leading Cases on Mines, p. 45; Gamboa, Com., Rockw. Transl., ch. II, §§ 19, 24, 25, 26; Hal. Int. De Fooz, § 11; Hal. Col., pp. 222, 381, 387; Ordinanzes de Minera, by Rockwell,

These provisions were substantially preserved and incorporated in the jurisprudence of the republic, and in all their essential elements are still the law in Mexico, as we shall see further on.[1]

p. 79 *et seq.* See also Yale, Mining Claims and Water Rights, pp. 44–47.

[1] *Post*, Part III, ch. IV.

CHAPTER II.

OF THE EARLY ENGLISH AND CONTINENTAL CUSTOMS AND LAWS, AND OF THE STANNATORS.

ARTICLE A.

Early English Customs.

§ 30. General observations — Tin bounding — The English customs and the customs of miners compared.
31. Similarity of customs in England to many of the district rules — Marking, notice and labor.
32. Of the custom of tin bounding — How exercised.
33. The right existed only as to waste lands — Work was necessary.
34. Other customs — Measuring the meers in Derbyshire.
35. Width of surface ground allowed — Other surface customs.
36. Similar customs in Gloucester — Gales — Free miner — Definition and rights.
37. Origin and antiquity of these customs.

§ 30. General observations — Tin bounding — The English customs and the customs of miners compared. — The most important of the early English customs which found expression in the mining customs of the Pacific Coast, and afterwards in the federal statutes, were those of tin bounding, and the qualifications, rights and duties of tin bounders. Added to these, there was introduced with the customs of the Pacific Coast a new innovation and a new and unique feature not known to the English customs nor to the commercial custom. Instead of the English, which closely followed the commercial custom, in that to be valid it must not only be reasonable but must have existed from time immemorial, the miners of the Pacific Coast introduced into their system of laws a custom which to be valid had only to be in force and be observed.[1] In other words, these customs,

[1] Comment in Preface.

as we shall have occasion to demonstrate in another part of this work,[1] were not the common-law or commercial customs, but a new and entirely different thing. Indeed, the word "custom" itself became easily convertible with and meant no more than was understood by the "by-laws of the district," or "district rules."

§ 31. Similarity of customs in England to many of the district rules — Marking, notice and labor. — The similarity of the English customs to the district rules early adopted in California was more noticeable in respect to the question of marking boundaries of claims, the exact equivalent of tin bounding, posting notice, the exact equivalent of giving notice, in the stannary courts; and the working of the tin claim within the bounds was reproduced in the district rules and later in the federal statutes, in the requirement of representation work or annual labor.

§ 32. Of the custom of tin bounding — How exercised. The custom in Cornwall and Devonshire most materially affecting the right to mine is that of tin bounding. While this custom has from many causes become, in modern times, comparatively inoperative, yet, as it has been recognized by recent statutes and decisions of the courts, and is the title by which some property is held and more may still be acquired, some space may not be improperly devoted to its consideration. Moreover, its bearing, as furnishing the foundation of some of the present law, renders it more material in the consideration of the subject of this chapter.

The custom, so far as it relates to Cornwall, is thus described in a case which recently came before the courts concerning it, and in which it was found to exist by the jury: "That any person may enter on the waste land of another in Cornwall, and mark out by four corner boundaries a certain area; a written description of the plot of land so marked, with metes and bounds, and the name of the person for whose use the proceeding is taken, is recorded in an

[1] See *post*, Part II, ch. I.

immemorial local court, called the stannary court, and proclaimed at three successive courts, held at stated intervals. If no objection is successfully made by any other person, the court awards a writ to the bailiff of the court to deliver possession of said 'bounds or tin work' to the bounder, who thereupon has the exclusive right to search for, dig and take to his own use all the tin and tin ore within the described limits, paying to the land-owner a certain customary proportion of the ore raised, under the name of toll-tin. The right descends to executors, and may be preserved for an indefinite time, either by actually working and paying toll, or by annually renewing the four boundary marks on a day certain."[1]

§ 33. The right existed only as to waste lands — Work was necessary.— This custom could only be invoked to protect one against a charge of trespass when it was asserted in respect to waste land. Moreover, the early custom claimed by some of the tinners of Cornwall, of renewing of boundaries once a year, being sufficient to reserve the right, was elaborately reasoned away by Lord Denman in a later case where he proceeds to say:

"It is right to observe, in passing, how every step, even in this strong invasion of the rights of ownership, still is made with reference to them. In the first place, the land to be bounded (we speak of a supposed original case of bounding) must be wastrel; if it be several and inclosed it must have been anciently bounded while wastrel, and so, in the language of the country, assured for wastrel; the liability must have first attached on it, therefore, before inclosure and devotion to other useful purposes. Then after the tinner or bounder has commenced by cutting the turves, and so marking out the limits within which he will work, proceedings are to be taken in the stannary courts, of which the owner has notice. . . . If he abstain from any in-

[1] Rogers v. Brenton, 10 Q. B. 26; ch. 105; Bainb. Mines (4th ed.), Coll. Mines, pp. 17, 18; 6 & 7 Vict., p. 149.

terference, it may well be considered that he has consented to the bounder's proceedings; and the customary render of the portion called toll tin may be a very sufficient consideration to him for what he gives up of his original exclusive rights. . . .

"This then brings us to the point . . . whether this customary right can exist without continuing *bona fide* to search for tin and to work the land for mining purposes within the inclosed limits; whether it is sufficient merely to renew the bounds annually by a new cutting of the turves as at the commencement."[1]

And the learned judge, after discussing the custom in all its features, and its manifest invasion of common-law property rights, and that the "only things," using his words, which made it reasonable were the rendering of the toll tin, and the supposed benefit to the public secured by the production of the mineral, and after discussing the question at length and the failure in his estimation of these provisions of toll rent and the public benefit to be gained, as fully satisfying the requirements of a common-law custom in respect to its reasonableness, decided emphatically that the mere renewing of boundaries could not be held sufficient nor could it be done without in good faith pursuing the mining operations. Said he: "The condition that the bounds shall be annually renewed by new cutting of the turves is useful for keeping the limits well ascertained, and also for preserving the evidence of ownership; but it is no substitute for the working itself, considered as the ground on which the reasonableness of the custom rests."[2]

[1] Rogers v. Brenton, 10 Q. B. 26; Coll. Mines. pp. 39–41.

[2] Rogers v. Brenton, *supra;* Coll, Mines, p. 43; Bastard v. Smith, 2 Moo. & Rob. 129 (see note of Mr. Smirke at the end of this case). See also Bainbridge, Mines (1st Am. from 3d London ed.), 6, 7; Laws Stan., p. 54; Vin. Abr. 10; Dod. Cornwall, p. 94; Stat. 16 Geo. II., 8; 26 Geo. II., 4, 8, 9, 12 and 13; 7 & 8 Vict., ch. 105, §§ 32, 84; 1 & 2 Vict., ch. 120; Plowd. 336; Rowe. v. Brenton, 3 M. & R. 497; Tannistry v. Davis, 17 L. J. (N. S.) 28; Attorney-General v. Mathias, 27 L. J. Ch. 766; Fawcett v. Lowther, 2 Ves. Sen. 303; Grinney v. Stocker,

§ 34. Other customs — Measuring the meers in Derbyshire. — By the customs recognized in certain portions of Derbyshire, relating to lead mines, any subject of the realm might enter and search for ore in all lands and places within the district, excepting churches, burial grounds, dwelling-houses and highways. This custom was in force mostly in the High Peak mines, although there was a similar one which obtained and was called the customs of the Low Peak.[1] By these latter customs, as defined by the Court Barmote, it was declared that by ancient custom a bar master should be chosen, who should be indifferent between the lord of the manor and the miners. The bar master, on receiving notice of a new discovery of a rake vein, was required to measure off and deliver to the finder two meers of ground, which were twenty-nine yards in length along the vein and generally fourteen yards in width. One of these meers was intended as a reward to the finder of the vein.[2] Thus, we have in this ceremony the equivalent of the practice in Mexico and other Spanish possessions, and which afterwards obtained in California and other western states and territories, whereby the officer, usually the mining recorder, went upon the ground and assisted in measuring the claim. Likewise, the counterpart of the law which obtained in California prior to the statute of 1866, and which found expression in that statute, whereby the discoverer was allowed an extra claim for discovery.[3]

The customs of the High Peak in Derbyshire have been lately recognized by statute.[4] They do not differ materially

34 L. J. Ch. 633; Gavee v. Martyn, 19 C. B. 732; Vice v. Thomas, Smirke Stannary Rep. 35; Doe v. Alderson, id. 29, 1 M. & W. 210; Crease v. Barrett, Cr. M. & R. 919; Blewitt v. Tregonning, 3 Ad. & E. 554; Rogers, Mines, ch. 16; Dyer, p. 60.

[1] B. & W. Lead Cas., p. 102, citing Bainb. Mines (3d Eng. ed.), ch. 16, p. 655; Rogers, Mines, chs. 15, 16; Arundell, Mines, ch. 2.

[2] Arundell, Mines, ch. 2.

[3] Act of Congress of July 26, 1866 (14 Stat. at L., p. 251).

[4] 14 & 15 Vict., ch. 94. See also Bainb. Mines, 665; Hardy's Miners' Guide, 1748; Beresford v. Bacon, Lut. 418; Gilbert v. Tomison, 4 D. & R. 222; Doe v. Pearce, Peake's Add. Cas. 242; Attorney-General v. Wall, 4 Brown P. C. 665; Arkwright v. Cantrell, 7 Ad. & Ell. 565.

from the Low Peak customs, except that they more clearly recognize and establish the size of the claim. If the vein was a rake vein, that is, one having an inclination to the horizon, the miner was allowed an extra surface right of four to six yards of ground. Here we have the first idea in England, and one of the foundations for the law in this country, of following the vein on its dip.

§ 35. Width of surface ground allowed — Other surface customs.— By width is meant the rake or dip of the vein as allowed by the custom. This was found in some cases insufficient, and this custom gradually gave place to another, whereby the fixed quantity in width, which was fourteen yards, was, in certain necessary cases, extended, when it became necessary to extend the width as shown in the last section; and it also became permissible for the bar master, with the aid of two of the jury of the county, to measure out, in measuring the meer, such additional ground as the miner might need, in connection with his vein, for the purpose of dumpage, laying rubbish and dressing his ore. This was called the "quarter cord," as it originally consisted of a quarter of a meer in breadth. Whether this was to be measured from the middle of the vein or from the walls was not a settled question. It is needless to say that it was generally secured in the direction of the rake or dip as far as possible. Before any ground could be set apart, however, it was necessary to "free the meer." This was accomplished by delivering to the crown officer, or the person representing him, the first dish of ore. This dish was provided by the bar master and was sufficient in size to hold fifteen pints of water. In like manner each successive meer allotted was "freed." This ceremony was equivalent to livery of seisin, and without it the title did not pass. Certain royalties were exacted from the miner which were called "lot and cope." A lot meant usually one-thirteenth part of all the ore raised, which was payable to the crown or its representatives. Cope was four pence for every load

of ore, a load consisting of nine dishes. It was also necessary that the mine should continue to be thoroughly worked. Originally, if it was capable of being worked and was suffered to remain idle, the bar master was required to "nick the spindle" once a week. The spindle being a stake driven in the ground marking the boundaries of the meer, and the "nick" was a notch, and when these notches aggregated in number the amount allowed by the custom of the manor, or the particular place, a forfeiture was declared unless work was resumed within three weeks. The right of possession was guaranteed as long as the regulations were complied with. The mine thus secured became an estate of inheritance, was liable to dower, descended to the heirs, and was capable of absolute disposition.[1] Thus we have in this custom another example and foundation of the early requirements of annual labor or representation work and of marking the boundaries. We have also the foundation for another feature of the present mining law, in the royalty payable to owners where mines are operated under leases.

§ 36. Similar customs in Gloucester — Gales — Free miner — Definition and rights.— There was also a custom in the forest of Dean by which free miners within the hundred of St. Briavels were entitled to have granted to them "gales" of the mines of coal and iron, and leases of the quarries of stone, within the lands of the crown, and within inclosed lands under certain restrictions. By the term "free miner" was meant all male persons born and abiding within the hundred, of the age of twenty-one years and upwards, who had worked a year and a day in the mines within the hundred. They were required to register with the gavaler or his deputy, he being the representative of the crown. A "gale" was the name given to the holders of mines of coal or iron and quarries of stone, a "free miner" acquiring a "gale."

[1] Bainb. Mines (4th ed.), p. 41; 1 Am. from 3d London ed., pp. 5–8 and note; 14 & 15 Vict., ch. 94.

being called the "galee," and the rents being called "galeage."[1] A "gale" was required by written application after approval by the commissioner and the bounds were marked, and the galee was obliged to work in an orderly manner and not desist for five years at any one time. The estate was in the nature of a fee simple, might be disposed of by will and descended to the heirs.[2]

§ 37. **Origin and antiquity of these customs.**— The origin, in the counties of Cornwall, Devon, Gloucester and Derby, of the customs we have mentioned seems not well or accurately known. Mr. Collier speaks of them as of very long standing. They probably originated in the laws of Cornwall, existing before the Roman invasion. Similar customs existed in France, Belgium, and probably some other parts of Europe.[3] The earliest evidence of the custom in Cornwall is found in a statute or charter granted in the third year of the reign of King John to the tinners of Cornwall and Devon, which speaks of it at that time as ancient.[4] These customs have been repeatedly recognized by statute but the purposes of this work do not require an extended reproduction here.

Article B.

Stannary Courts and Stannary Parliament.

§ 40. Introductory and historical — The stannaries and the derivation of the term.

41. Of the organization of the stannary courts.

42. Jurisdiction and functions of the stannary court between tinners, and between tinners and others.

[1] McSwinney, Mines, p. 482.

[2] McSwinney, Mines, pp. 488, 489.

Free Miner in Canada.— The term "free miner" has been used in the Canadian provinces to designate the qualifications of a person entitled to acquire mining property, and means any person or joint-stock company in possession of a free miner's certificate. Act New Brunswick 1891, 98 and 99, § 2; Act governing placer mining in Yukon district, Jan. 16, 1898, § 1; Reg. Manitoba, July 21, 1897. These certificates may be obtained by any person or corporation upon application and payment of a fee.

[3] Coll. Mines, p. 22.

[4] Coll. Mines, p. 22. See also Doe v. Pearce, 2 Peake M. P. C. 242; Gilbert v. Tomison, 4 D. & R. 222.

§ 40. Introductory and historical — The stannaries and the derivation of the term.— The term "stannary" is undoubtedly derived from the country where tin was mined prior to the Roman invasion. The Latin word is "stannum," which means tin. But this is doubtless a late and scholarly rendering of the word. By the medieval Latin, stannaries meant a tin mine.[1] And when it is considered that Latin roots and Latin words generally have a significance more or less strongly resembling the customs and places of their derivation, the conclusion is not extravagant that the word "stannary" was understood to mean a place where tin was mined. Thus, we find that the stannators, as they were called, which meant nothing more than the tin miners of the stannary district, met at a very early day on Hingston Down, a tract of highland on the Cornish side of the river Tamar, where they convened what was known as the stannary parliament, being composed of twenty-four stannators, representing the combined tinners of Devon and Cornwall.[2] The last parliament of the stannaries met at Truro, Cornwall, in 1752.[3] These stannators of course made laws for the government of the stannary, and doubtless these laws formed the foundation work, if not the full text, of the customs later recognized by King John and Edward I. and also by Edward III.[4] Here, too, was the genesis of the thought that obtained and was recognized in California by the creation called the "miners' meetings of the district," which convened to enact the district rules.[5]

§ 41. Of the organization of the stannary courts.— Naturally enough, the making of laws without a tribunal for their enforcement would, in the experience of mankind, be a useless function. Therefore, the miners of Cornwall and Devon found it necessary to establish, at a very early

[1] Century Dict., tit. Stannary.
[2] Ency. Brit., vol. 6, p. 377.
[3] Id.; Coll. Mines, p. 136.
[4] 3 Bl. Com., p. 80; 4 Inst. 232; Coll. Mines, p. 137; Chart. 3 John; Chart. 33 Edward; Chart. 50 Edward; 16 Charles I., ch. 15.
[5] Yale, Mining Claims and Water Rights, pp. 58, 70, 73.

date, a court of their own creation, which is recognized at the present time, and is called the "stannary court."[1] It had common-law and chancery jurisdiction over all rights and matters pertaining to the tinners of Cornwall and Devon, excepting those involving land, life and member.[2] It is presided over at the present time by a judge called the "vice-warden;" it was formerly presided over by the stewards of the stannary. An appeal lies to the lord warden of the stannaries, who is the Duke of Cornwall, *ex officio*, if he is of full age, otherwise the crown or a person appointed by the crown;[3] and from him an appeal lies to the supreme court of adjudication.[4] It may be observed in passing, that the lord warden of the stannaries may, under existing statutes,[5] call to his assistance, in the decision of any appeal, three judges of the superior or supreme court, or the judicial committee of the privy council. The common-law jurisdiction was granted by the charters of John and Edward I., above mentioned.[6]

§ 42. Jurisdiction and functions of the stannary court between tinners, and between tinners and others.— An extensive inquiry into the jurisdiction of the stannary courts would be beyond the scope of this commentary, and more useful to the historian and antiquarian than to the law-

[1] 3 Bl. Com., p. 80; Dod. Hist. Cornwall, 94; Coll. Mines, p. 136; Ency. Brit., vol. 6, p. 377; Arundell, Mines, ch. 10. For modern statutes of England on this subject, see 6 & 7 Wm. IV., ch. 106; 2 & 3 Vict., ch. 58; 7 & 8 Vict., ch. 105; 11 & 12 Vict., ch. 85; 18 Vict., 32. See note 6, *infra*.

[2] Coll., Mines, p. 136.

[3] Ency. Brit., vol. 6, p. 377; 3 Bl. Com., p. 80; B. & W. Lead. Cas., p. 104.

[4] 3 Bl. Com., p. 80.

[5] Coll., Mines, p. 136.

[6] Id., p. 137. Colorado has a statute legalizing the judgments of all "miners' courts," "Kansas courts" or "miners' clubs." Mills' Ann. Stats., §§ 2586–2589. The necessity for such statutes as this, doubtless was occasioned by the miners of Colorado in the early days, many of whom came direct to this country from Cornwall, following their customs here and adopting the same modes of adjusting their difficulties which existed in their native country.

yer. Its similarity in one respect to the federal jurisdiction may be observed in passing, namely, regarding its jurisdiction over the persons of residents of different states. Thus, a privileged tinner might insist on being sued in his own court; tinners could sue each other only in the stannary courts. Again, a foreigner, that is a non-resident of the jurisdiction, might sue a tinner at large either in the stannary court or in a common-law court,[1] the reason for which is said to be because their business being highly profitable to the public, it is best that they be not taken therefrom to attend foreign courts.[2] Likewise it had jurisdiction to grant leases of tin and copper mines.[3] This court had, in addition to the special and customary jurisdiction, also common-law and chancery jurisdiction, which has been said to be of very great antiquity, recognized rather than created by John and Edward I.

Article C.

Miscellaneous Laws, Customs and Matters.

§ 45. The French and Belgian law.
46. Qualifications required to obtain mining lands and rights

§ 45. The French and Belgian law.— By the Code Napoleon of 1810, elaborate provision was made for the working and operation of mines. As we have already seen,[4] there was a dispute between Napoleon and the legislative power as to where the title to mines, considering them as separate from the soil, ultimately reposed; Napoleon claiming them as part of the soil, while the council insisted upon the regalian or at least the sovereign right. A compromise was effected whereby a new creation was said to be made and a new property brought into existence by the discovery of a mine.[5] The most important matter, however, contained

[1] Attorney-General v. Lambe, 11 Beav. 213.

[2] 2 Bl. Com. 80.

[3] Attorney-General v. Lambe, *supra;* Rowe v. Brenton, 3 M. & R. 497; Rogers v. Brenton, 10 Q. B. 26.

[4] See *ante*, § 4 and notes.

[5] Ibid. See also De Foot, Mines, pp. 37, 38, 40.

in these ordinances and also in the ordinances of 1837, which found place in our law, was the recognition bestowed upon the discoverer, whereby he was given and recognized to possess extralateral rights, and those of marking the boundaries of the claim or concessions; likewise the concession from the state of the mining right, independent from the soil itself, which found recognition in our law by the granting of the patent.[1]

§ 46. Qualifications required to obtain mining lands and rights. — By the law of the stannaries the unyielding rule was enforced that only miners, that is stannators within the district, were accorded the particular rights and entitled to the particular privileges of appealing to their own courts.[2] By the rule enforced within the hundred of St. Briavels, within the forest of Dean, in the county of Gloucester, only free miners had the right to have gales measured out to them.[3] Thus it is we arrive by easy stages to the provision in our own law that only citizens of the United States, or those who have declared their intention to become such, may acquire mineral land and mining claims on the public domain of the United States by location.[4] This latter qualification, however, as we shall see further on in this work,[5] did not have its sole foundation in the English and continental customs, but found its chief reason for existence in the necessity of the times and of excluding Mongolian foreigners from acquiring mining claims by location.[6] In England, however, the king can grant lands only in pursuance of law and to competent persons.[7]

[1] De Fooz, Mines, p. 99 *et seq.* See also De Fooz, Mines, ch. 3, p. 30; Id., ch. 10, p. 87.

[2] 3 Bl. Com. p. 80; Coll. Mines, ch. 4. See also *ante*, §§ 41–43.

[3] See *ante*, §§ 36, 43. Free miner's capacity is said to have been destroyed by 1 & 2 Vict., ch. 43; Attorney-General v. Mathias, 4 Kay & J., 519.

[4] R. S. U. S., § 2319.

[5] *Post*, Part I, ch. 5; Part II, ch. 2.

[6] See Yale, Mining Claims & Water Rights, pp. 75–77; Id., pp. 34–42.

[7] Attorney-General v. Mathias, *supra*.

CHAPTER III.

OF THE MEXICAN AND SPANISH ORDINANCES.

§ 50. Preliminary observations — Completeness of Spanish ordinances.
51. Gamboa's views — Completeness of Spanish ordinance.
52. Same subject — General Halleck's views.
53. Examples of similarity — Discovery, working, registering, etc.
54. A summary of the foregoing by Mr. Yale.

§ 50. Preliminary observations — Completeness of Spanish ordinances.— Most writers reasonably familiar with the subject, ascribe to Spain a position very early in date in the history of mining law. It is quite certain that the Roman laws governing the acquisition and operation of mines were copied extensively from the laws of Spain in existence long before the conquest of Spain by the Roman Empire. Indeed, while the reproduction of the Spanish law to any considerable extent is foreign to the purpose of this work, even a cursory examination thereof cannot be made without the impression becoming fixed as to the completeness of detail with which those laws dealt with the subject of the operation of mines. And, inasmuch as the district rules in California and the statutes of the United States had for their origin, to a very great extent, the mining ordinances of Mexico and Spain, it is necessary to examine such portions of those ordinances as were reproduced in our own laws, either completely or by a similarity of detail. Prior to the acquisition of the territory embraced within the terms of the treaty with Mexico in 1848, these laws furnished the guide in mining operations within the territory so acquired, and naturally enough, so far as they were applicable, they became the rule of action after that treaty.

§ 51. Gamboa's views — Completeness of Spanish ordinances.—While it will be necessary throughout this work to refer to the similarity of those ordinances to those laws, as occasion shall require, it is nevertheless essential to an or-

derly examination of the subject that we detail at this time at considerable length the salient features wherein a resemblance or identity of provision exists between our own law and the Spanish. Those laws, moreover, were so complete within themselves that it is impossible for a complete examination of mining law to be made without entrenching upon their provisions. Senor Gamboa, a Spanish author, writing on this subject as early as 1760, says: "There is no need to have recourse to other nations for mining ordinances: our own are amply sufficient. In framing them, recourse was had to the laws of Germany as stated and explained by Agricola, although the mines of that country differ from ours in the dimensions assigned to them, and in the mode of managing them when held by partners. It cannot be denied that the laws of the state of Hesse are very copious, little less so indeed than those of the Palatinate, as illustrated and stated by Krebs; but almost every contingency is comprehended in, and provided for by, our own.[1]

§ 52. Same subject — General Halleck's views.— Speaking of the elaborateness of detail with which the Spanish and Mexican laws covered the subject of mining and mining operations, General Halleck, in his introduction to De Fooz on Mines, puts it thus: "But the miners of California have generally adopted, as being best suited to their peculiar wants, the main principles of the mining laws of Spain and Mexico by which the right of property in mines is made to depend upon discovery and development; that is, discovery is made the source of title, and development or working the condition of the continuance of that title. These two principles constitute the basis of all our local laws and regulations respecting mining rights."[2]

§ 53. Example of similarity — Discovery, working, registering, etc.— Without reproducing at large the provisions

[1] Gamboa, Com., Rockw. Trans., ch. 1, sec. 12; Rockw., Spanish and Mexican Law, p. 121; United States v. Castillero, and Castillero v. United States, 67 U. S. 1, per Clifford, J., Op. VII–4.

[2] Halleck, Int. De Fooz, Mines, §§ 5–7; Yale on Mining Claims and Water Rights, p. 71.

of the Mexican ordinances, that is to say, the Spanish law upon the subject, it is sufficient for the purpose of this section and this work, that the mining laws of Spain and Mexico, which were copied in their essential features into our own, made ample provision for rewarding the discoverer by allowing him two extra pertenencias upon a newly-discovered vein.[1] These pertènencias varied slightly, but were generally two hundred varas along the course of the vein, and a varying distance on the dip, according to the inclination from the perpendicular; the greater the inclination, the greater the width of the pertenencia or portion of surface area.[2] A vara is about eleven-twelfths of a yard. Provisions were made for registering, which literally meant recording the mine with the proper officer of the mining district, which was a mining judge if there should be one; the posting of notice at the church of the district, and proclaiming the same each week for a fixed period of time, generally from one to three months; the surveying of the pertenencias, marking of boundaries and the requirement of a specified amount of work, generally a stated number of days within a fixed period of time.[3] Besides these provisions there was a further one called "denouncement." A mine might be denounced for abandonment if the former claimant should neglect to do the required amount of work; likewise, contiguous unclaimed land might be denounced and thus brought within the possession of the claimant, but only a fixed amount of additional ground could be acquired.[4]

§ 54. A summary of the foregoing by Mr. Yale.— To summarize the matter in hand and its application to the subject before us, we cannot improve upon the statement of Mr. Gregory Yale:

"The real mining code, as far as it can be traced by legal earmarks, has sprung from the customs and usages of the

[1] Gamboa, Com., ch. VIII; Rockw. Spanish and Mex. Law, pp. 211–13.

[2] Gamboa, Com., ch. IX; Rockw. Mines, pp. 221, 223 and 224.

[3] Gamboa, Com., chs. X, XI, XII, XV, XVII, XVIII; Rockw. Span. and Mex. Laws, pp. 236, 242, 284, 293, 306, 320.

[4] See last preceding note.

miners themselves, with rare applications of common-law principles by the courts to vary them. Most of the rules and customs constituting the code are easily recognized by those familiar with the Mexican ordinances, the continental mining codes, especially the Spanish, and with the regulations of the stannary convocations among the tin bounders of Devon and Cornwall in England, and the High Peak regulations for the lead mines in the county of Derby. These regulations are founded in nature, and are based upon equitable principles, comprehensive and simple, have a common origin, are matured by practice, and provide for both surface and subterranean work, in alluvion or rock '*in situ.*' In the earlier days of placer digging in California, the large influx of miners from the western coast of Mexico and from South America necessarily dictated the system of work to Americans, who were almost entirely inexperienced in this branch of industry, with a few exceptions from the gold mines of North Carolina and Georgia, and from the lead mines of Illinois and Wisconsin. The old Californians had little or no experience in mining. The Cornish miners soon spread themselves through the state, and added largely, by their experience, practical sense and industrious habits, in bringing the code into something like system. The Spanish-American system which had grown up under the practical working of the mining ordinances of New Spain was the foundation of the rules and customs adopted.

"Senator Stewart has ascribed undeserved merit to the early miners in pronouncing them the authors of the local rules and customs. In his letter to Senator Ramsey of Minnesota (Appendix No. 1 to 3, Wallace's U. S. Supreme Court Reports), he says that the miners were forced, from the necessity of the case, to make laws for themselves; that each mining district formed its own rules and adopted its own customs, the similarity of which throughout the entire mining region, extending over an area of fifty thousand square miles, was so great as to attain all the beneficial results of well-digested general laws.

"They were democratic in their character, guarding against every form of monopoly requiring continued work and occupation in good faith to constitute a valid possession. This letter is an interesting paper, coming from a representative miner, and is correct in stating the nature of the rules and customs and the uniformity of their adoption. But they were not the spontaneous creation of the miners of 1849–50. Historical accuracy ascribes a different origin to them. They reflect the matured wisdom of the practical miner of past ages, and have their foundation, as has been stated, in certain natural laws, easily applied to different situations, and were propagated in the California mines by those who had a practical and traditional knowledge of them in their varied form in the countries of their origin, and were adopted, and no doubt gradually improved and judiciously modified, by the Americans. This self-evident fact can be admitted without detracting from our national pride. The Romans preserved the mining laws and customs which had prevailed in the gold and silver mines in Spain long before its conquest by Rome; and the legions of Julius Cæsar were taught the mode of mining for tin by the ancient Britons, whose very name is derived from that vulgar metal, and whose laws and customs are still in force in the same localities, originating in a remote antiquity, surviving all changes of conquest, language and race. In acquiring the mines, our magnanimity will enable us to accept the mining customs, in part, from the same people, and not exhibit the selfishness of Great Britain, whose exclusive codes are so perfect and absolute, according to her most distinguished author on mining laws, that the local law of a provincial realm, prevailing before Cornwall and Devon were parts of England, must be rejected as an *imperium in imperio*. 'The law of England allows no supremacy of this kind. It tolerates a *lex loci* as a reasonable usage, and it only admits the written Pandects of Justinian and the decretals of Gregory in the same humble garb of custom.'" [1]

[1] Yale, Mining Claims and Water Rights, pp. 58, 59, citing Bainb. Mines, 557.

PART II.

FORMATIVE PERIOD, INCLUDING THE HISTORY OF THE FEDERAL STATUTE, LIKEWISE THE EARLY STATE STATUTES AND DISTRICT RULES.

CHAPTER I.

OF THE EARLY DECISIONS IN THE UNITED STATES, INCLUDING THE POLICY EXPRESSED IN EARLY STATUTES.

§ 56. Of the general policy of the government in reserving minerals and mineral lands from sale.
57. Earlier statutes — Lead mines reserved from sale.
58. Other reservations in pre-emption and other agricultural acts.
59. Policy of reservation declared and upheld by the courts.
60. President Polk urges a correction of the evil.
61. Further condemnation of the leasing scheme — Further recommendations as to California.

§ 56. Of the general policy of the government in reserving minerals and mineral lands from sale.— The general policy of the United States as expressed in the statutes, executive acts and proclamations prior to 1845 was to reserve the mineral lands from sale absolutely. These lands, so far as then known, consisted of lead, iron, copper and zinc lands in that part of the United States territory which was then called the Northwest or Indian Territory, and comprised that portion of the country now embraced within the states of Michigan, Wisconsin, Illinois, Iowa, Missouri and Minnesota. This policy was entrenched upon occasionally by acts authorizing the president of the United States to lease certain lead lands. This policy and these acts, as might naturally be expected, were provocative of mischief and endless

disputes. It was impossible to collect the rents and royalties with certainty or regularity.[1]

Sales of mineral lands, that is to say, lead lands, were finally authorized by statute, but this applied only to the lead lands of the upper Mississippi. At first only Missouri was included.[2] By a later statute,[3] lead lands in Illinois, Wisconsin, Iowa and Arkansas were authorized to be sold for the space of six months. By a still later act the copper, lead and other mineral lands of Michigan were authorized to be sold after an advertisement of six months;[4] later, the lead land in the Chippewa district in Wisconsin was included.[5]

§ 57. Earlier statutes — Lead mines reserved from sale.— The first expression, in a legislative way, reserving the mines for the use of the government, was the ordinance of 1785, which was entitled: "An ordinance for ascertaining the mode of disposing of lands in the Western Territory." It made provision for the appointment of surveyors, gave directions as to the mode of making surveys and platting townships, and required the surveyors to note the presence of all mines, salt licks or mill seats that should come to their knowledge. It also made reservation of certain sections, and specifically of one-third of all gold, silver, lead and copper mines; and this reservation was required to be inserted in deeds, which certain of the states were thereby authorized to execute.[6] To further entrench this

[1] United States v. Gratiot, 1 McLean, 454, Fed. Cas. No. 15249, 26 Fed. Cas. 12; Indiana v. Miller, 3 McLean, 151, Fed. Cas. No. 7022, 13 Fed. Cas. 25; Cooper v. Roberts, 18 How. 173; Wilcox v. Jackson, 13 Pet. 498; United States v. Gratiot, 14 Pet. 526. In the last case the court says: "It has been the policy of the government, at all times, in disposing of public lands, to reserve the mines for the use of the United States."

[2] Act of March 3, 1829 (4 Stat. at L., p. 364).

[3] Act of July 11, 1846 (9 Stat. at L., p. 37).

[4] Act of March 1, 1847 (9 Stat. at L., p. 146).

[5] Act of March 3, 1847 (9 Stat. at L., p. 179).

[6] Journals of Congress, vol. 10, p. 118; Lind. Mines, § 30; Mr. Gilpin's argument in United States v. Gratiot, 14 Pet. 526, 529.

policy, congress by a later act[1] made provision for the reservation of all lead mines in the Indian Territory or Northwestern Territory in these words: "Any grant which may hereafter be made for a tract of land containing a lead mine, which shall be discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null, and the president of the United States shall be and is hereby authorized to lease any lead mine which has been or may hereafter be discovered in the Indian Territory, for a term not exceeding five years."

§ 58. Other reservations in pre-emption and other agricultural acts.— By acts of May 29, 1830, April 5, 1832, March 2, 1833, July 14, 1832, June 26, 1834, June 22, 1838, June 1, 1840, September 4, 1841, which were all acts on the subject of pre-emption and disposal of public lands, congress in nearly every instance expressly reserved the lead mines. In the act of 1834, however, which created an additional land district in Wisconsin, there was express authority given to the president in terms as follows: "The president shall be authorized, as soon as the survey shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land districts, at the land offices in the respective districts in which the land so offered is embraced, reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals and the state of Illinois, and such reservations as the president shall deem necessary to retain for military posts, any law of congress heretofore existing to the contrary notwithstanding."[2]

§ 59. Policy of reservation declared and upheld by the court.— In the case mentioned in the last preceding section, the entire legislation of congress was reviewed and commented upon by counsel and the court. Gear, a pre-emp-

[1] Act of March 3, 1807 (2 Stat. at L., p. 448, § 5).

[2] Act of June 26, 1834. See briefs of counsel, United States v. Gear, 3 How. 120.

tioner, settled upon and claimed the right to pre-empt certain sections of these lands under the pre-emption laws as they then existed, containing this sweeping power in the act of 1834. The United States brought two suits of trespass and for an injunction, the main question being whether these lands were public lands and reserved, and, if so, whether the digging of lead ores constituted such waste as authorized the maintenance of the action. The supreme court, mindful of the policy of the government prior thereto and at that time, said: "Why should congress, without certain words showing an intention to depart from the policy which had governed its legislation in respect to lead mine lands in the whole Indian territory from 1807 to 1834, be supposed to have meant to exempt a portion of the lead mine lands in that territory from that policy, in the act, the whole purview of which was to create additional land districts?" And that court held that the land was reserved and not open to pre-emption.[1]

In another case prior to that, as we have already seen,[2] the supreme court, speaking upon the question of policy of the government in this matter, declared in unequivocal terms that policy to be the reservation of mines to the use of the United States. This, then, was the policy of the law which crystallized into that provision of the federal statute which says: "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise directed by law."[3]

§ 60. President Polk urges a correction of the evil.— So great an evil had this policy become, that in his first annual message to congress December 2, 1845, President Polk invited the attention of congress to the subject, and urged legislation to correct the evil, in these words: "The present system of managing the mineral lands of the United States is believed to be radically defective. More than one million acres of the public lands, supposed to contain lead and

[1] United States v. Gear (two cases) 3 How. (44 U. S.), 120-133.

[2] United States v. Gratiot, 14 Pet. 526; *ante*, § 57 and note.

[3] R. S. U. S., § 2318; Act July 26, 1866 (14 Stat. at L.), p. 67; 18 id., p. 476.

other minerals, have been reserved from sale, and numerous leases upon them have been granted to individuals upon a stipulated rent. The system of granting leases has proved to be not only unprofitable to the government, but unsatisfactory to the citizens who have gone upon the lands, and must, if continued, lay the foundation of much future difficulty between the government and the lessees. According to the official records the amount of rents received by the government for the years 1841, 1842, 1843 and 1844 was $6,354.74, while the expense of the system during the same period, including salaries of superintendents, agents, clerks, and incidental expenses, was $26,111.11, the income being less than one-fourth of the expenses. To this pecuniary loss may be added the injuries sustained by the public in consequence of the destruction of the timber and the careless and wasteful manner of working the mines. The system has given rise to much litigation between the United States and individual citizens, producing irritation and excitement in the mineral regions and involving the government in heavy additional expenditures. It is believed that similar losses and embarrassments will continue to occur while the present system of leasing these lands remains unchanged. These lands are now under the superintendence and care of the war department, with the ordinary duties of which they have no proper or natural connection. I recommend the repeal of the present system, and that these lands be placed under the superintendence and management of the general land office, as other public lands, and be brought into market and sold upon such terms as congress in their wisdom may prescribe, reserving to the government an equitable percentage of the gross amount of mineral product, and that the pre-emption principle be extended to resident miners and settlers upon them at the minimum price which may be established by congress."[1]

§ 61. Further condemnation of the leasing scheme — Further recommendations as to California.— We have

[1] Messages and Papers of the Presidents, Richardson, vol. IV, p. 410.

elsewhere said that the problem what to do with the mining interests of California, and how best to provide laws governing the same, engaged the attention of the executive as well as the legislative branch of the government from the time California was first acquired until the enactment of the statute was finally accomplished. President Fillmore took the oath of office on the 10th day of July, 1850, and in his first annual message to congress is found this pertinent recommendation and statement of his views of the objectionable features of the leasing scheme: "I also beg leave to call your attention to the propriety of extending at an early day our system of land laws, with such modifications as may be necessary, over the state of California and the territories of Utah and New Mexico. The mineral lands of California will, of course, form an exception to any general system which may be adopted. Various methods of disposing of them have been suggested. I was at first inclined to favor the system of leasing, as it seemed to promise the largest revenue to the government, and to afford the best security against monopolies; but further reflection, and our experience in leasing the lead mines and selling lands upon credit, have brought my mind to the conclusion that there would be great difficulty in collecting the rents, and that the relation of debtor and creditor between the citizens and the government would be attended with many mischievous consequences. I therefore recommend that, instead of retaining the mineral lands under the permanent control of the government, they be divided into small parcels and sold, under such restrictions as to quantity and time as will insure the best price and guard most effectually against combinations of capitalists to obtain monopolies."[1]

Mr. Yale mentions, "more as matter of legislative history than of law," several proposed legislative measures that were introduced following closely upon the heels of this message, but nothing came of them until the act of 1866.[2]

[1] Messages and Papers of Presidents, Richardson, vol. V, p. 87.

[2] Yale on Min. Claims and Water Rights, 340, 350.

CHAPTER II.

OF THE EARLY CALIFORNIA STATUTES.

§ 63. Preliminary observations.
64. The operation of the foreign miners' tax.
65. The foreign miners' tax—All foreigners considered miners.
66. A more discriminating step—Mongolians only intended—Miners by legislation.
67. The mask thrown off—Chinese immigration squarely legislated against.
68. The rule of evidence—The customs of the bar or diggings.
69. Other examples of statutes recognizing customs.

§ 63. **Preliminary observations.**—Many of the California statutes, during the first fourteen years of its existence, were at once striking, curious and unique, both in their originality and the end sought to be gained. For the main part they assumed to be the means of raising revenue, but in reality were shafts aimed at Chinese immigration, and many of them threw off the mask and delivered their force squarely at the problem of Chinese exclusion. By other laws the state sought to protect the miners in the possession of their mining claims and to require good faith in their holding and operation. Others sought to engraft ludicrous doctrines of evidence upon the statute books, while still others were well calculated to foster the mining industry to the extent of the power of the state to do so.

§ 64. **The operation of the foreign miners' tax.**—The legislature of California and the judiciary of the state seem to have had a reasonably fair appreciation of the lack of power in the state to deal directly with the primary disposal of the soil which belonged to the United States, inasmuch as the only land not falling within the dominion of the federal government was that included within Mexican grants

and that which had been granted to the state for educational and other purposes. But the state was confronted with a serious problem. There was no law to prohibit Oriental foreigners, and all others coming to the state, from acquiring, by location, mining claims to the same extent and thereby acquiring the same rights which could be secured by a citizen of the United States. This was a condition to which American manhood was loth to submit; how to correct the mischief was a serious question. They knew of their sovereign power to collect revenue by taxation, and they carried the taxing power to the utmost limits; thus,—

§ 65. The foreign miners' tax — All foreigners considered miners.— The first attempt in this direction was a foreign miner's tax.[1] This law imposed a tax of twenty dollars per month on all foreigners engaged in mining.[2] This was repealed, and later[3] an attempt was made to collect revenue from foreign miners under an act the title of which was: "An act to protect foreign miners." And the ludicrous feature of it was that the miner, so called (and the legislature seemed to think he was a miner if he was a foreigner), could not prosecute or defend any action in the state unless he had paid the tax.[4] This monstrous doctrine did not long remain upon the statute book and was repealed by the act of March 30, 1853.[5] It seems to have been too frivolous to engage the attention of the courts, while the first act was upheld by the supreme court as constitutional and a legitimate exercise of the taxing power.[6] This act of 1853 was thus commented upon by Mr. Gregory Yale: "This is the longest act of the series upon this subject, and is directed chiefly to an effort to get the money into the treasury after it is collected from the foreigner,

[1] Act April 13, 1850; Yale, Mines, p. 94. See also People v. Naglee, 1 Cal. 232.

[2] Id.

[3] Session Acts 1852, p. 82; Yale, Mines and Water Rights, p. 35.

[4] See last preceding note. See also People v. Coleman, 4 Cal. 46.

[5] Yale, Mining Claims and Water Rights, p. 35.

[6] People v. Naglee, *supra*.

which seemed to be the subject of greatest embarrassment. The only punishment directed against the foreigner for non-payment is the sale of his property upon an hour's notice, which must be considered mild and satisfactory, as the same thing is done to all American citizens for the non-payment of a poll tax. By the seventh section of this act of 1853 any person or company hiring foreigners to work in the mines is made liable for the amount of the license for each person so employed."[1] The collection of this tax in this manner was upheld by the supreme court.[2]

§ 66. A more discriminating step — Mongolians only intended — Miners by legislation. — The early statutes, as already pointed out, aimed their shafts against foreigners generally, the striking feature of all those statutes being the attempt on the part of the legislature to exclude foreigners all by name, the Chinese especially by intendment, from engaging in the business of mining; also from a residence in the country.[3] Later there was a slight discrimination in this particular to the extent that a distinction was made between that class of foreigners who might, by reason of eligibility, become citizens of the United States, and the others — which meant Mongolians — who were ineligible to become citizens.[4] Thus, in 1857 there were several amendments to the act of 1853, the first of which was an amendment exempting from the operation of the tax persons who had declared their intention to become citizens of the United States,[5] and later, by an act of the legislature, that non-eligible foreigners, that is, persons ineligible to become citizens of the United States, residing within a mining district, "shall be considered as miners, under the provisions of this act."[6] And by another act[7] it was provided that

[1] Yale, Mining Claims and Water Rights, p. 35.

[2] Meyer v. Larkin, 8 Cal. 403. See also Ex parte Ah Pong, 19 Cal. 106.

[3] Yale, Mining Claims and Water Rights, pp. 35–37.

[4] Id.; Act April 30, 1855.

[5] Yale, Mining Claims and Water Rights, pp. 36, 37. See also acts of March, 1857, and April 7, 1857.

[6] Act of 1861; Yale, Mining Claims and Water Rights, pp. 37, 38, and cases cited.

[7] Id.

no person who is not a citizen of the United States, or who has not previously declared his intention to become such (California Indians excepted), "shall be allowed to take gold from the mines of this state, or to hold a mining claim therein" without a license, as provided in the act.[1] But the supreme court wisely said that the legislature could not make a Chinaman a miner unless he was one in fact.[2]

§ 67. The mask thrown off — Chinese immigration squarely legislated against.— It will thus be seen that, while the legislation was ostensibly enacted to collect revenue, the real purpose was to exclude Chinese from operating mining claims. Indeed, the statute of 1852,[3] above mentioned, had for its preamble a recital of the circumstance of the prejudice existing in the mining districts in consequence of foreigners being permitted to labor in the mines and to work placer and quartz diggings in competition with American labor. By a later act[4] the legislature declared, in the title of the act, its purpose to be to protect white labor against competition with Chinese coolie labor, and to discourage the immigration of Chinese into the state. This act, however, by the means employed, followed the same line as the others, exercising the only power the state possessed — that of taxation. By the first section a tax was levied, called a police tax, upon every person of the Mongolian race over eighteen years of age, male and female, residing in the state, except those who paid the foreign miners' tax and those exclusively engaged in the production of sugar, rice, coffee and tea, of which there were none in the state.[5] Rigid provision was made for the collection of this tax, the validity of which was denied by the supreme court in an exhaustive opinion, but wherein the Naglee case

[1] Yale, Mining Claims and Water Rights, p. 37.

[2] Ex parte Ah Pong, 19 Cal. 106.

[3] Act May 4, 1852, Sess. Laws, p. 424; Yale, Mining Claims and Water Rights, p. 34.

[4] Act April 26, 1862; Yale, Mining Claims and Water Rights, p. 39.

[5] Id.; Sess. Laws 1862, p. 462. See *post*, § 82, for further discussion of this subject.

was not referred to, the court basing its conclusions upon the lack of power in a state to infringe upon the authority of the federal power in respect of its intercourse with foreign nations.[1]

§ 68. The rule of evidence — The customs of the bar or diggings.— Not all the early statutes have been enumerated in the foregoing, but only enough to show the early controlling policy to exclude foreigners, especially Chinese, from operating the mines. There were other provisions not necessary to notice for the purposes of this work. Strange to say, out of this chaos of incongruous matter, one wholesome rule of evidence was evolved by statute; it was like shifting a grain of wheat from a load of chaff. This is a statutory rule of evidence, now existing in nearly all the precious metal-bearing states, by which the customs or regulations of the bar or diggings are made competent evidence. The California statute was enacted in 1851, and reads as follows: "In actions respecting mining claims, proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claims; and such customs, usages or regulations, when not in conflict with the laws of this state, must govern the decision of the action."[2] This statute is generally copied *verbatim* or substantially into the codes of the mining states and territories, and the evidence is competent and controlling.[3]

§ 69. Other examples of statutes recognizing customs.— Thus, while the California statute only recognized quartz or lode claims by implication,[4] the other states have

[1] Lin Sing v. Washburn, 20 Cal. 534. See also People v. Raymond, 34 Cal. 492, and cases on p. 498.

[2] See the various statutes in the appendix. See also Cal. Prac. Act 1851, § 621; Cal. Code Civ. Proc., § 748.

[3] Hicks v. Bell, 3 Cal. 219; Dutch Flat Water Co. v. Mooney, 12 Cal. 534; Morton v. Salambo C. M. Co., 26 Cal. 527; Myers v. Spooner, 55 Cal. 257; Riborado v. Quang Pang M. Co., 2 Idaho, 136, 6 Pac. Rep. 125; Boggs v. Merced M. Co., 14 Cal. 279, 378.

[4] Cal. Code Civil Proc., § 748; Yale, Mining Claims and Water Rights, pp. 59, 60.

generally gone further and have enacted provisions sufficiently comprehensive to include all kinds of locations. For example, the Utah statute reads as follows: "In actions respecting mining claims, proof must be admitted of the customs, usages and regulations established and enforced in the district, bar, diggings or camp embracing such claims; and such customs, usages or regulations, when not in conflict with the laws of this state or of the United States, must govern the decision of the action."[1] Similar customs obtain and are recognized by statute in Wisconsin and Missouri. In the latter state, where a license to prospect is given, the terms of which are not given, the statute provides that the same shall be determined by the custom of the district.[2] In the former, in the absence of contract to the contrary, forfeitures for negligent mining, or failure to mine, are controlled by usage and custom. This rule also applies in the interpretation and explanation of mining contracts.[3]

[1] R. S. Utah, 1898, § 3521. [2] R. S. Mo., 1899, § 8767.
[3] R. S. Wis., 1898, § 1647.

CHAPTER III.

DISTRICT RULES BEFORE THE STATUTE.

§ 73. Miners' meetings — Birth and evolution of the rules.
74. Miners' meetings — Where held — Organization — Enactment of rules — Not open to attack generally.
75. Of the miners' rules — Purposes of reproduction.
76. Of the general nature of the rules — Boundaries of districts — Size of claims and how acquired.
77. Character of the miners and the laws made by them — Result of the discovery of gold in California.
78. Consent of the governed — A social compact — Penal provisions.
79. Notice — Boundaries — Work required and other provisions — Forfeiture and for what.
80. Forfeiture, what constitutes — Grounds for.
81. Dips, spurs and angles — Origin of the terms — Source of the apex rule.
82. Alien ownership opposed — Early traces of thought, afterwards crystallized into statute.
83. Miners' regulations and rules recognized by and crystallized into statute.

§ 73. Miners' meetings — Birth and evolution of the rules. — While the meeting of the miners of the district in a *quasi*-legislative capacity, for the purpose of preparing a code of rules for their common guidance, is characteristic of a truly republican institution, a sort of local democracy, yet the fact remains that the custom had its birth in the stannary parliament of Cornwall and Devon.[1] The very name given to this legislation: "Miners' rules and customs," "customs of the bar or diggings," "local rules and customs,"[2] establish this beyond controversy. Nothing nearly resem-

[1] See *ante*, § 40.

[2] Cal. Code of Civil Proc., § 748; R. S. Utah, 1898, § 3521; Morton v. Solambo Copper M. Co., 26 Cal. 527; Conger v. Weaver, 6 Cal. 548; Gold Hill Q. M. Co. v. Ish, 5 Oreg. 104; People v. Morrill, 26 Cal. 336; Hess v. Winder, 30 Cal. 349; Boggs v. Merced Mining Co., 14 Cal. 279, 398.

bling it seems to have been elsewhere known so far as our research discloses.

§ 74. Miners' meetings, where held — Organization — Enactment of rules — Not open to attack generally. — These meetings were usually held at some public place in the district. If organized generally at the recorder's office, or place where the records were kept. If unorganized, they were held at some public known place, and in either case upon notice posted in several places in the vicinage or district. They were organized by electing a presiding officer; and by-laws, as a whole, were not infrequently prepared and reported by a committee; these included generally all the matters thought necessary or convenient and were adopted by vote. Amendments were made in the manner authorized by the laws themselves, and were usually adopted in the same way as were the originals. But as to the mode of adopting rules or by-laws there was no fixed rule, nor would courts inquire into the mode of adoption. As we have seen, it was sufficient that they existed and were observed.[1] Concerning this question it was said: "There is nothing in the point that the mining laws offered in evidence were passed on a different day from that advertised for a meeting of miners. We cannot inquire into the regularity of the modes in which these local legislatures or primary assemblages act; they must be judges of their own proceedings. It is enough that the miners agree — whether in public meeting or after due notice — upon their local laws, and that these are recognized as the rules of the vicinage, unless some fraud be shown or some other like cause for rejecting the laws."[2]

§ 75. Of the miners' rules — Purposes of reproduction. It is foreign to the purposes of this work to give in detail the miners' rules as they existed before the statute. It is

[1] See *ante*, § 30.

[2] Gore v. McBrayer, 18 Cal. 582; English v. Johnson, 17 Cal. 107; Roberts v. Wilson, 1 Utah, 292; Harvey v. Ryan, 42 Cal. 626.

rather our purpose to reproduce only such as furnish the foundation upon which the present law is builded. The object of this is obvious and is twofold:

1. The evolution of the law is useful if not essential to a correct understanding of its purposes.

2. Decisions were and are now being made under those rules, and their value is enhanced or diminished in proportion to the similarity or dissimilarity of those rules to existing rules or statutes.

The general observation may be made in passing, that the miners' rules generally provided for the manner of locating, marking, recording and operating mining claims, as well as the work necessary within a given time to hold them. At first only placer claims were provided for, but gradually the elastic force of necessity enlarged the scope and operation of these laws and rules to lode, lead, ledge or vein claims as well.[1]

§ 76. Of the general nature of the rules — Boundaries of districts — Size of claims and how acquired. — To give in detail the exact provisions of the miners' rules would serve no useful purpose, inasmuch as the size of the claims only conformed in part to the law of 1866, and was radically changed, as we shall see further on, by the law of 1870 and 1872. Our main purpose, in order to demonstrate the value of the early decisions, is merely to indicate that similar provisions to existing law were found in the early miners' rules, and thus to illustrate the decisions as well as to show the matter out of which the statutes and present laws were formed.

A succinct statement of the general nature and character of these rules, of the manner of holding claims and working them, and of the mode of dividing into districts, was early made by Commissioner J. Ross Browne, and we take the liberty of reproducing it here: "It is impossible to obtain, within the brief time allowed for this preliminary report, a

[1] Yale, Mining Claims and Water Rights, pp. 73–84.

complete collection of the mining regulations, and they are so numerous that they would fill a volume of one thousand pages. There are not less than five hundred mining districts in California, two hundred in Nevada, and one hundred each in Arizona, Idaho and Oregon, each with its set of written regulations. The main objects of the regulations are to fix the boundaries of the district, the size of the claims, the manner in which claims shall be marked and recorded, the amount of work which must be done to secure the title, and the circumstances under which the claim is considered abandoned and open to occupation by new claimants. The districts usually do not contain more than one hundred square miles, frequently not more than ten, and there are in places a dozen within a radius of ten miles. In lode mining the claims are usually two hundred feet long on the lode; in placers the size depends on the character of the diggings and the amount of labor necessary to open them. In the hill diggings, where the pay dirt is reached by long tunnels, the claim is usually one hundred feet wide, and reaches to the middle of the hill. Neglect to work a placer claim for ten days in the season when it can be worked is ordinarily considered as an abandonment. The regulations in the different districts are so various, however, that it is impossible to reduce them to a few classes comprehending all their provisions. The states of Nevada and Oregon and the territories of Idaho and Arizona have each adopted statutes in regard to the size and tenure of mining claims; and these statutes, so far as they conflict with the district regulations, probably supersede them, although the act of the last session of congress to legalize the occupation of the mineral lands provides for the issue of patents to only the holders of those lode claims which are occupied and improved according to the local custom or rules of miners in the district where the same are located."[1]

[1] Min. Resources, 1867, p. 226; Yale, Mining Claims and Water Rights, p. 72.

§ 77. Character of the miners and the laws made by them — Result of the discovery of gold in California.— The discovery of gold in California was followed, as is well known, by extensive immigration into the state, which increased its population within three or four years from a few thousand to several hundred thousand people. The lands in which the precious metals were found belonged to the United States and were reserved and were not open by law to occupation and settlement. Little was known of them, except that they were situated in the Sierra Nevada mountains. Into these mountains emigrants in vast numbers penetrated, occupying the ravines, gulches and canyons, and probing the earth in all directions for the precious metals.[1]

In the case just cited, Mr. Justice Field, speaking of the history of the times and of the miners and the rules made by them, uses this language: "Wherever they went they carried with them that love of order and system and fair dealing which are prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground which they could safely hold for mining was designated, their possessory right to such ground enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the character and extent of the mines, distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. . . . The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claim taken up, and in all controversies, except as against the government, he was regarded as the original owner from whom title was to be traced."[2]

§ 78. Consent of the governed — A social compact — Penal provisions.— They were laws resting on compact

[1] Jennison v. Kirk, 98 U. S. 453, 25 L. ed. 240.

[2] Id., 25 L. ed. 242. See also Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 420.

alone — that is, so far as their validity was concerned. But nevertheless, as a general rule, laws were never more faithfully observed than were those. There may have been other reasons for this truth — doubtless there were, as we shall presently observe. The great truth that "law is organized power"[1] was never more positively demonstrated than in respect of the miners' rules. It is true, as said by Senator Stewart: "They (the miners) made the law and they obeyed it." But it is not too much to say that obedience was as rigidly enforced here as under the most exacting municipal authority. Concerning this subject Mr. Lindley has succinctly grouped some of the penal provisions of the miners' rules and the mode of enforcing the same, and as no more correct statement can be made, we take the liberty of reproducing it: "For example, those adopted at Jacksonville, California, provided for the election of an alcalde, who propounded the law in a court from whose judgment there was no appeal, and wherein the rule of practice was 'to conform as nearly as possible to that of the United States; but the forms of no particular state shall be required or adopted.' To steal a mule or other animal of 'draft or burden,' or to enter a tent or dwelling and steal therefrom gold-dust, money, provisions, goods or other valuables, amounting in value to $100 or over, was considered a felony, and on conviction thereof the culprit should suffer 'death by hanging.' Should the theft be of property of less value, the offender was to be 'disgraced' by having his head and eyebrows close-shaved, and by being driven out of camp. The wilful and premeditated taking of human life was an offense of the same grade as stealing a mule, death being the penalty. A sheriff was elected to carry judgments into effect, and generally to enforce the decrees of the judge and preserve the peace."[2]

§ 79. Notice, boundaries, work required and other provisions — Forfeiture, and for what. — These rules without

[1] Speech of Mr. James C. Carter, see *ante*, § 1.

[2] Lindley, Mines, § 42, pp. 46, 47.

exception required discovery to precede location, the posting of notice and recording the claim, and the marking of boundaries, as the essentials of a valid location or claim. They also required work as a condition of holding them, which was usually specified as a fixed amount in value or a fixed number of days within a given period. No dog-in-the-manger policy, no drones, were allowed here. It was a common understanding that when a location was made it would be followed with the requisite amount of development work or improvements, and forfeiture was the penalty for not working.[1]

§ 80. Forfeiture, what constitutes — Grounds for.— But forfeiture only followed when that was made the penalty. It mattered not what harsh rule was sought to be established requiring work, or any other act, as a condition to obtain or hold a claim; unless forfeiture was made the penalty, the court, following well-known rules, declined to make that the consequence of failure. The supreme court of California in an early case, which has been followed as authority, thus states the rule: "The right of a mining claim vests by the taking in accordance with local rules. The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with such of them as make non-compliance a cause of forfeiture."[2]

§ 81. Dips, spurs and angles — Origin of the terms — Source of the apex rule.— The phrase, "dips, spurs and angles," as defining or intended to define the right to pursue the vein on its downward course or dip, seems to have had its origin as a phrase, or more properly a series of phrases, in the miners' rules. Nothing of a similar nature was known under the Mexican law, the common law or the civil law.

[1] Yale, Mining Claims and Water Rights, pp. 77-79.

[2] McGarrity v. Byington, 12 Cal. 231, 426; Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. Rep. 130.

True, as we have had occasion to remark, the idea of the existence of a right, or, perhaps more properly, that a right should exist in the discovery of a vein, to follow it on its dip wherever it might go, must have proceeded partially from the right recognized in Derbyshire of granting a more extended right in respect of a "rake vein" than any other.[1] And likewise in an ancient Prussian statute, long obsolete, wherein the right was accorded to a discoverer or owner of a superficial outcrop of a vein to pursue it any depth on its dip.[2] This thought may also have received an impulse from the doctrine laid down by De Fooz, who, quoting from Jousselin, says: "Mines can be worked with advantage only when they are treated *en masse*, or in sections of a certain extent, without reference to surface boundaries."[3] At all events the discussion of this question, which is postponed to a future portion of this work,[4] opens a field for discussion wherein much can be said upon both sides. On the one hand it is but simple justice that he who discovers the outcrop or apex of a vein should be permitted to follow it on its dip wherever it may go to an endless extent; while on the other hand there is no shutting our eyes to the fact that in practice it has been provocative of more disputes than any other one principle of mining law. Indeed, that seems to have been the main cause for the abolition of the system in Prussia.[5]

§ 82. **Alien ownership opposed—Early traces of thought, afterwards crystallized into statute.**— Enough has already appeared herein to illustrate the righteous opposition to the practice, as matter of right, of aliens locating and holding mining claims; that it was a fruitful source of disputes and trouble cannot be questioned; that the encroachment of pauper labor presented a serious menace to existing political

[1] See *ante*, §§ 34, 35. See also Yale, Mining Claims and Water Rights, p. 77.

[2] Mineral Resources, 1869, p. 195.

[3] De Fooz, Mines, p. 12; Jousselin, Traite des servitudes d'utilite publique.

[4] *Post*, Part XI.

[5] Klosterman, Prussian Mining Laws, 1870.

conditions cannot be gainsaid; and that the seriousness of this question prompted the insertion in the federal statute of the provision that the mineral lands were open only to location by citizens of the United States and those who had declared their intention to become such, no one will dispute. That the force of the statute has somewhat miscarried, as we shall see when we consider that question,[1] detracts nothing from the seriousness of the mischief sought to be corrected by it, and hence one of the purposes of its enactment.

To illustrate the force of these observations we need only quote the words of one who, from the fact of living and practicing and writing law at a time contemporaneous with the evil, is therefore best qualified to speak of it: "The mining laws always provide for the legal status of those who shall be entitled to the privileges of the miners of the district. The restriction is to citizens and those entitled under the law to become citizens. The construction among the miners under these laws excludes the Mongolian race. In some of the laws, like those of Columbia district, Tuolumne county, the rule is that 'no Asiatics shall be allowed to work in this district.' This excludes them as laborers as well as locators. At New Kanaka Camp, in the same county, article 7 reads: 'Chinamen shall not be allowed to own claims in this district, either by purchase or pre-emption.' The rule is general throughout the mines. The holders of claims are not allowed to employ Chinamen to work for them. This sentiment is deep-rooted and all-pervading. There are exceptions in some localities where the matter is treated with silent toleration. The law of the case is another matter, and it is beyond the reach of state legislation to alter it, as seen when treating upon the foreign miners' tax, and the true correction must be left to time, which is the most convenient remedy for social evils when there is no other at hand."[2]

[1] See *post*, Part V.

[2] Yale, Mining Claims and Water Rights, pp. 75, 76. See also *ante*, §§ 63–68.

§ 83. Miners' regulations and rules recognized by, and crystallized into, statute.— These regulations and customs were appealed to in controversies in the state courts, and received their sanction to the extent that properties to the value of many millions of dollars were dependent upon them for title and right of possession for eighteen years. From 1848 to 1866 the regulations and customs of the miners, consisting of the great body of miners' rules which we have mentioned, as interpreted and enforced by the courts and sanctioned by the legislation of the state, so far as lay in the power of the legislature, on the subject, constituted the law governing the property to mines and the water rights used in connection therewith. It is matter of history, already pointed out, that until 1866, excluding two unimportant provisions, which will be noticed in the next chapter, no legislation was had looking to the sale of the mineral lands. The policy of the country had previously been, as already shown, to exempt such land from sale.[1] And this legislation, as must appear from the foregoing, was largely moulded upon these customs and rules.[2]

[1] Jennison v. Kirk, 98 U. S. 458. [2] Morr. Min. Rights (8th ed.), p. 4. See also *ante*, § 59.

CHAPTER IV.

OF THE IMPLIED LICENSE TO OCCUPY MINERAL LANDS AND THE EQUITIES GROWING OUT OF SUCH POSSESSION.

§ 86. Review of the situation — Governmental policy.
87. Judicial recognition in California — Miners' rights not to be ignored.
88. Judicial knowledge of miners' rights.
89. This equitable right was equivalent to a franchise.
90. Necessity of framing a judicial policy — Miners impliedly the licensees of the United States.
91. Recognized by the supreme court of the United States.
92. First recognition of miners' possessory rights and miners' rules by federal legislation.
93. The evolution of governmental policy — Further recognition of local rules by statute.
94. Summary.

§ 86. Review of the situation — Governmental policy.— It will be observed by the preceding sections that a system had sprung up in California unique in all its environments. The United States, which owned the land in which the mines were found, had provided no legislation protecting miners in the enjoyment of them, nor authorizing the working thereof. On the contrary, the policy of the government, so far as expressed in its legislation and the decisions of the courts, was inimical to the operation of the mines. But, while this was true in an express sense, by implication and non-resistance at least, the policy was fast slipping away and being supplanted by another, which, tacitly at least, licensed such use of the mines.

§ 87. Judicial recognition in California — Miners' rights not to be ignored.— This system, moreover, was engaging and employing a large amount of capital and producing a vast amount of wealth in the output of gold. Rights had

to be recognized and protected by something stronger than the mere rules of the miners, resting only upon consent on the one hand, and a sort of lawless might upon the other. The courts, with the elastic possibilities of the common law,[1] stretched forth their strong arms and protected this *quasi*-right secured or asserted by the miners and protected them in their possession.

§ 88. Judicial knowledge of miners' rights, but not of miners' rules.— In an early case Judge Heydenfeldt, speaking for the court, at page 146 says: "Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this state a large part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the state governments. And with the exception of certain state regulations, very limited in their character, a system has been permitted to grow up, by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government and heartily encouraged by the express legislative policy of the other. If there are, as must be admitted, many things connected with this system which are crude and undigested and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata*. Among these are the rights of miners to be protected in their selected localities."[2] Perhaps no quarrel should be made as to the extent of judicial knowledge asserted as the basis of the foregoing opinion, but that is the limit of judicial knowledge as applied to

[1] Conger v. Weaver, 6 Cal. 548.

[2] Irwin v. Phillips, 5 Cal. 140. See also Tartar v. Spring Creek W. & M. Co., 5 Cal. 395; Hoffman v. Stone, 7 Cal. 46; Merced Min. Co. v. Fremont, 7 Cal. 317; Gold Hill Q. M. Co. v. Ish, 5 Oreg. 104, 11 M. R. 635.

mining law. Regarding the miners' rules themselves, the local laws of the district or the records of miners' meetings, it is well settled that they must all be proven as facts; and no rule or district law will be presumed or assumed to exist which is not proven.[1]

§ 89. This equitable right was equivalent to a franchise.— Moreover, this silent acquiescence was in principle closely allied to the granting of a franchise. It is unnecessary to assert any such preposterous principle as an estoppel against the government. We need only resort to the principles of the common law, under which comprehensive system we find the doctrine of presumptions stepping in to aid us, whereby, except as against the paramount proprietor, the government, a grant would be presumed. As was said by the supreme court of California in an early very able case: "That new conditions and new facts may produce the novel application of a rule which has not been before applied in like manner does not make it any less the common law, for the latter is a system of grand principles founded upon the mature and perfected reason of centuries. It would have but little claim to the admiration to which it is entitled if it failed to adapt itself to any condition, however new, which may arise; and it would be singularly lame if it is impotent to determine the right of any dispute whatsoever. Having, as far as we have gone, met all difficulties by adhering to its doctrines, we have no ground to presume that we will have to go beyond its precincts for a solution of any which may arise. One of the favorite and much indulged doctrines of the common law is the doctrine of presumption. Thus, for the purpose of settling men's differences, a presumption is often indulged where the fact presumed cannot have existed."[2] Since, therefore, a grant of any kind may be presumed, the supreme court of Oregon, speaking of the right to occupy and work mining

[1] See *post*, § 123.

[2] Conger v. Weaver, 6 Cal. 548-556. See also Eldridge v. Knott, Cowp. 215; Goodtitle d. Parker v. Baldwin, 11 East, 488.

claims, was right in announcing the doctrine that a franchise would be presumed.[1]

§ 90. Necessity of framing a judicial policy — Miners impliedly the licensees of the United States.— The necessity of thus framing and promulgating a judicial policy was daily made more positive and exacting. The miners were there in possession of their mining claims, and it were a shocking commentary on the common law if adequate means and authority were not found therein to protect such possession.[2] Contrary, then, to the expression of former decisions,[3] the silence of the United States, its *laissez faire* policy, justified the conclusion several times reached by western courts, as we have already seen, that the occupants were the licensees of both governments. We notice this policy for the reason that the same questions may again arise in some parts of the domain of the United States. Not only was it true that there was no law of the United States forbidding the miners from taking possession of the mining claims, working them and extracting and appropriating to their own use the precious metals therein contained, but on the contrary, the government, with at least the judicial knowledge spoken of by Judge Sanderson in a previous section, by its silence encouraged the continuation of the enterprise. Moreover, the courts of both governments (state and federal) protected these possessions and possessory rights and treated them for the purposes of particular suits, which was sufficient for the occasion, as having all the attributes of fixed property rights. A party thus in possession could sustain any and all actions necessary to protect the property for the time being; a trespasser could not do this. The possessor was therefore considered the favored licensee of both govern-

[1] Gold Hill Q. M. Co. v. Ish, 5 Oreg. 104. See also Conger v. Weaver, *infra;* Hill v. King, 8 Cal. 336, 338; McKeon v. Bisbee, 9 Cal. 137, 142; Partridge v. McKinney, 10 Cal. 181, 183; State v. Moore, 12 Cal. 70; Curtis v. Sutter, 15 Cal. 263; Hughes v. Devlin, 23 Cal. 506.

[2] Conger v. Weaver, 6 Cal. 548; Irwin v. Phillips, 5 Cal. 140.

[3] United States v. Gear, 3 How. 120, 11 L. ed. 523.

ments — of the one by its silence and acquiescence and of the other by force of all the beneficial legislation it was able to enact to protect its licensee, and as such had the right to resort to any remedy either government could maintain against a wrong-doer. It was immaterial that the terms of these licenses were neither express, certain nor capable of clear definition; they existed nevertheless, and created equitable circumstances recognized as binding upon the consciences of both governments;[1] and it must be said to the everlasting praise of the courts of California intrusted with the protection of these rights and the administration of justice, that they went the full length authorized by the elastic principles of the common law and seldom erred except on the side of equity and justice.

§ 91. Recognized by the supreme court of the United States.— It is thus apparent that there was at least a silent recognition on the part of the United States of the miners' rights secured by possession. But there was even more than that: there was the positive declaration of judicial knowledge by the highest court in the land, and a recognition of these possessory rights, and likewise of the binding force of the local rules, the common law of mining, in a comprehensive opinion, where occurs the following: "We know, also, that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. . . . And we cannot shut our eyes to the public history which informs us that under this legislation, and not only without interference by the national government but under its implied sanction, vast mining interests have grown up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country."[2] True, a statute of Nevada was under consideration in this case, but the prin-

[1] Merced M. Co. v. Fremont, 7 Cal. 317.

[2] Sparrow v. Strong, 3 Wall. 97, 18 L. ed., p. 49, citing the Laws of Nevada Ter., p. 16, § 40, and p. 21, §§ 74–77.

ciple is the same. "A condition and not a theory" confronted the country and the supreme court was equal to the occasion. Ours is a growing country, and it is not impossible that these precise questions may again engage the attention of the courts. They therefore possess a double value here as furnishing a precedent in such cases and as reflecting the history of this formative period, and the bearing thereof as an elementary constituent of and upon the present law.

§ 92. First recognition of miners' possessory rights and miners' rules by federal legislation.—Twice did the thirty-ninth congress, by the passage of laws, one commonly called the Homestead Act,[1] and the other an act granting certain lands to the state of Nevada,[2] re-affirm its policy and the policy of the government theretofore expressed, of reserving the mineral lands from sale. But its predecessor, the thirty-eighth congress, recognized, by the first legislative expression, the possessory rights of the miners upon the public domain, in an act providing for a district and circuit court for the district of Nevada. This is the text of the provision: "That no possessory action between individuals in any of the courts for the recovery of a mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines lie is in the United States, but each case shall be adjudged by the law of possession."[3] This section was continued in force in the Revised Statutes of the United States,[4] and was the first real recognition of the miners' rights.

The thirty-ninth congress, in an act extending the boundaries of the state of Nevada, made a further recognition of the miners' rights by the following provision: "That all possessory rights acquired by citizens of the United States

[1] Homestead Act of June 21, 1866 (14 Stat. at L., pp. 66, 67).

[2] Act concerning lands granted to state of Nevada, July 4, 1866 (14 Stat. at L., pp. 85, 86).

[3] Act of Feb. 27, 1865 (13 Stat. at L., p. 440).

[4] R. S. U. S., sec. 910.

to mining claims, discovered, located and originally recorded in compliance with the rules and regulations adopted by miners in the Pah-Ranagat and other mining districts in the territory incorporated by the provisions of this act into the state of Nevada, shall remain as valid, subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining states and territories."[1]

§ 93. The evolution of governmental policy — Further recognition of local rules by statute. — It is apparent from the foregoing that while the rules essential to the acquisition of mineral lands and the manner of holding possession and title thereto as they existed in Spain and Mexico were substantially preserved in the miners' rules and regulations enforced in California prior to the statute, the theory of the relationship of the general government and of the controlling government of whatever name towards the mines and the mineral lands underwent a radical change. The observations of Mr. Dallas, in his notes to Bainbridge on Mines, succinctly states the salient features of this transition, and are therefore reproduced: "The government of Mexico succeeded that of Spain as the sovereign of the public lands in California, and the United States in turn succeeded Mexico. Whether or not the property in the mines of gold and silver was incident to the ownership of the soil or to the right of sovereignty became a question of considerable importance after the cession of the land containing them to the United States; but, after such discussion, it seems now to be settled that to the owner of the soil, whether the government or a private individual, the minerals belong as a part of the land, and not to the government as an incident of sovereignty."[2]

[1] Act concerning boundaries of state of Nevada, May 5, 1866 (14 Stat. at L., p. 43).

[2] Dallas' Notes to Bainb. Mines (1st Am. ed.), p. 38. See also Moore v. Smaw, and Fremont v. Flower, 17 Cal. 199; Ah Hee v. Crippen, 19 Cal. 491; Boggs v. Merced M. Co., 14 Cal. 279; s. c., Mining Co. v. Boggs, 8 Wall. 304; United States v. Castillero, 2 Black, 871; United States v. Parrott, 1 McAll. 271, 27 Fed. Cas.

We have already noticed the views of the courts, both federal and state, as to the relationship borne by the occupants of mineral lands to the true title and to the national government. They had a well-recognized right, which the courts felt bound to protect and which the legislatures recognized. And in furtherance of this view, the national government, by the law of 1866, recognized the local rules as of binding and essential force in the acquisition of title.[1]

§ 94. **Summary.**— It will thus be seen that the local rules, regulations and customs of the miners not only furnished the most essential elements entering into the mining laws of 1866 and 1872, but over and beyond that they had become so firmly engrafted upon the system of the times that it became essential to continue them in force, and they were continued by statute and the recognition of the courts, and may be now characterized as the common law of mining within the public land states of the Union.[2] It is quite clear that out of those rules and the system of which they formed a part has been evolved much that is valuable in the mining law of to-day, and which we shall have occasion to refer to from time to time in other portions of this work.

No. 15,998; Fremont v. United States, 17 How. 542; Chouteau v. Meloney, 16 How. 203.

[1] Act of July 26, 1866, § 1 (14 Stat. at L., p. 251).

[2] King v. Edwards, 1 Mont. 235, 4 M. R. 480; Morton v. Solambo C. M. Co., 26 Cal. 527; Jennison v. Kirk, 98 U. S. 453.

CHAPTER V.

THE ENACTMENT OF THE STATUTE, INCLUDING CIRCUMSTANCES LEADING THERETO.

§ 97. Introductory — Historical matter.
98. How the law was passed — A summary by Mr. Yale.
99. Same subject — Other historical matters — Substitutions and failures.
100. How the name was changed.
101. Summary of the statute — Its general purposes.
102. Criticisms by bench and bar — A judicial summary — Insufficiency of the statute of 1866.
103. Further commentaries on the act of 1866.
104. The placer mining act of 1870.
105. The statute of 1872 — The general system introduced thereby.
106. The general purposes and features of the law of 1872.
107. Radical differences between the law of 1866 and 1872 — The lode — The surface rights.

§ 97. Introductory — Historical matter.— In the foregoing sections we have discussed many of the elements and principles which were given life and force by statutory recognition in the law of 1866. Naturally it was a subject concerning which there was a division of opinion in the minds of the public men of that day. Some favored a system of leasing at high rate of rent; others favored a partial disposition in the way of a concession with a provision of royalty perpetual running to the government. There were some, too, without definite plans, who looked upon the mining property as a means of paying the national debt. Other imperfect plans, coming from at least two sources, were put forth, clamoring for recognition as a means of settling the much-vexed question. On the one hand, were those whose cupidity was excited by this vast aggregation of hidden wealth, who, as above stated, saw in it a means of bettering

the national condition. On the other hand, were the miners themselves, who insisted, through their representatives, that the chaotic condition resulting from the lack of plenary legislation on the subject should cease, and that they were entitled to something better than their own local rules and regulations for the definition and protection of their rights.

The situation was becoming serious, and required the most thoughtful consideration.

In the mines themselves frequent brawls and disturbances were directly traceable to the want of adequate laws defining and protecting the miners' rights.

We have already seen that action on the part of congress looking towards a sensible solution of the question had been recommended, even forcibly urged by President Fillmore.[1]

In this chapter we shall endeavor to perpetuate as best we may, the salient and essential features of the public history surrounding the enactment of the law of 1866, as a connecting link in the exposition of the elements entering into the mining law of to-day.

§ 98. How the law was passed — A summary by Mr. Yale. — Mr. Yale, in giving the history of the passage of this mining law, details the attempt of Senators Stewart and Conness to procure the passage of a comprehensive mining law, and of the efforts of the secretary of the treasury, aided by Senator Sherman and others, to make of it a higher revenue act, and how it was finally passed under the title of "An act granting the right of way to ditch and canal owners through the public lands, and for other purposes;" obviously giving no inkling whatever of the contents, objects or purposes of the bill. Mr. Yale says: "The miners of California and the states and territories adjacent thereto have but a very inadequate idea of the im-

[1] *Ante*, § 61. See also Richardson, Messages and Papers of the Presidents, vol. V, p. 87.

minent peril in which the pursuit in which they are engaged was placed at the commencement of the thirty-ninth congress. Two years before there was a strong disposition in congress and the east generally to make such a disposition of the mines as would pay the national debt. The idea of relieving the nation of the payment of the enormous taxes which the war saddled upon us, by the sale of the mines in the far-distant Pacific slope, about which few people here have any knowledge whatever, was, perhaps, the most popular that was ever started. Compelling other people to liquidate your obligations has been in all ages and in all nations a highly comfortable and popular proceeding. There were some at the time of which I write who would not be satisfied with the sale of the mines. They held that even after the sale the government should be made a sharer in the proceeds realized from them."[1]

§ 99. Same subject — Other historical matter — Substitutions and failures. — Perhaps a little irregular from a chronological point of view, but nevertheless as a part of this legislation, it is proper to state here that the thirty-ninth congress was not the first one which had wrestled with this question. Mr. Thomas Ewing, as secretary of the interior, had as early as December, 1850, recommended a scheme of leasing.[2] Senator Fremont, directly after his induction into the office of United States senator from California, namely, on September 14, 1850, introduced a bill to make "temporary provision for the working of gold mines and placers in California, and for preserving order in the mines."[3] This bill, however, did not pass, and the one under consideration in the previous section, mutilated as it was in the course of its passage by having its name stricken off and another one

[1] Yale, Mining Claims and Water Rights, p. 10.

[2] Yale, Mining Claims and Water Rights, pp. 21, 341.

[3] Cong. Globe, vol. 22, Part 2, p. 1815; Yale, Mining Claims and Water Rights, p. 341.

substituted for it, was the first successful attempt at legislation in this direction.

Mr. Yale, after stating that the first bill on the subject was introduced in duplicate by Mr. Sherman, of Ohio, in the senate, and by Mr. Julian, of Indiana, in the house, both of which were highly objectionable to the Pacific delegation, but the house seemed committed to the question and went so far as to pass a resolution in the same direction, says: "After much canvassing, Mr. Conness and Mr. Stewart came to the conclusion that it was no longer safe to act on the defensive, and that it was necessary to determine what legislation would be acceptable, and to make a bold move to obtain it. The secretary of the treasury was then one of the strongest advocates of the sale of the mines, and appeared to be under the impression that it would yield a large revenue. . . . Mr. Conness accordingly suggested to him to have a bill prepared in his department which would avoid the odious provisions of the other two propositions, and get some senator to introduce it, assuring him that a liberal measure would receive the favorable consideration of the Pacific delegation. The result was that the secretary had prepared the second bill introduced by Mr. Sherman, which was a great gain on the first bill. This bill went to the committee on mines, of which Mr. Conness was chairman and Mr. Stewart a member. After much discussion these two senators were appointed to draft a substitute, which, after several weeks of close study, resulted in the reporting of a bill substantially the same as the one which is now the law."[1]

§ 100. How the name was changed.—This bill, in substantially the form proposed by the committee, passed the senate, but was sidetracked in the house by being referred to the wrong committee, Mr. Julian's, on his motion, who was determined to have his bill, the former one, passed or disposed of first. The house was canvassed and found favor-

[1] Yale, Mining Claims and Water Rights, p. 11.

able to the views of the Pacific delegation. In the meantime Higby, chairman of the house mines committee, had passed from the committee on mines a bill in regard to ditches; it contained only three provisions, and bore no resemblance to the bill in question, but it related to the same subject. When this bill came into the senate the mining bill was tacked on as a substitute and was passed. It was then sent back to the house and went on the speaker's table. In that condition it required a majority to refer it. To get that majority Julian exerted all his strength, but failed. The bill was passed in the house without amendment and became a law. This accounts for its being entitled "An act granting the right of way to ditch and canal owners through the public lands, and for other purposes."[1]

§ 101. Summary of the statute — Its general purposes.— The provisions of the act of July 26, 1866, including the position they occupy in the Revised Statutes of the United States, may be summarized as follows: Section 1 provided for the location of mineral lands by citizens of the United States and those who had declared their intention to become such, and its substantial provisions were continued in section 2319. Section 2 provided for the filing of an application for patent by a qualified person or persons who had complied with the law and the local rules and regulations, and section 3 related to the same subject, and likewise to the posting and publishing of notice and of the filing of adverse claims. Both these sections were incorporated into section 2325 with the exception of the provision relative to miners' rules, which was enlarged upon in section 2324. The provisions of section 4 related to the entry of the claim and provided for the size of the claim, which was limited to two hundred feet in length along the vein for each locator, with an additional claim of that size to the discoverer, and also authorized the patenting of such surface ground as was permitted by the local rules and regulations.

[1] Yale, Mining Claims and Water Rights, p. 12.

The limit in length on one vein for an association of persons was by this section placed at three thousand feet. And by the first proviso in the same section we find the first legislative expression of the right to pursue the vein on its downward course or dip, the words used being, "with the right to follow such vein any depth, with all its dips, variations and angles." This section, in all its essential elements, was continued in sections 2324, 2331 and 2322. Section 5 was continued almost *verbatim* in section 2338. Section 6 related to proceedings on adverse claim and was incorporated in section 2326. Section 7 was continued in section 2343. Section 8 related to the right of way for highways over the public lands. Section 9 was continued in section 2339, section 10 in 2341, and section 11 in 2342.[1]

§ 102. Criticisms by bench and bar — A judicial summary — Insufficiency of the statute of 1866.—The general purposes of the act may be summarized as that of authorizing the location and disposition of the public mineral lands. The end finally reached, as we have seen, was a compromise; crude, and never satisfactory to either bench or bar. Speaking of this statute and the mischief arising from its crudities, Mr. Justice Kibby, in an Arizona case, said: "The first act of congress recognizing the rights of miners was in 1866, which, among other things, provided for patenting to persons who claimed a lode of quartz or other rock in place bearing gold, silver, etc. Here congress recognized the customs and rules of miners whereby the claim was to the lode as distinguished from the land itself. It was inevitable from this condition of things that disputes should arise among rival claims to mineral-bearing lodes. The questions of priority of discovery and notice, and of the extent of the claim, were of easy solution. The question of the identity of the lode presented almost unsurmountable obstacles. True, lawsuits were instituted and decided; courts found that ore found in one place was from the same lode as that

[1] 14 Stat. at L., p. 251.

discovered may be a thousand feet away. Mining experts and geologists projected into the realm of facts their theories and their guesses. This was the best that could be done. Certainty was impossible, an approach to it was improbable. Mining rights were most precarious. The miner's right to that part of the lode at his discovery shaft was subject to defeasance by establishing that he was upon but a spur of his neighbor's lode and not on his lode. These conditions were provocative of disputes and of consequent litigation. They offered a premium to the unscrupulous to institute lawsuits, for in them the chances of success for the unjust and the just were about equal — it was but a lottery."[1]

§ 103. **Further commentaries on the act of 1866.**— While mining lawyers have never claimed perfection for this act, we are all bound to admit that it was a strong entering-wedge in the right direction. It was not what its leading advocates in the senate (Senators Stewart of Nevada, and Conness of California) desired or sought, but it was rather the expedient accepted on the principle that it was better than no legislation. Perhaps Mr. Yale's views were as correct a statement as any of the consensus of contemporaneous opinion entertained by bench and bar alike respecting this statute. He says: "As the initial act to the legislation which must necessarily follow, it is more commendable as an acknowledgment of the justice and necessity which dictated it, and its expediency as a means to the advancement of the material interests of the state and nation, than for the perfection of its provisions or their exact adaptation to the accomplishment of the object intended. We must not, however, find fault with the law on account of its imperfections or the introduction of objectionable features in the mode to be followed in acquiring a title under it. These imperfections can be remedied, the rights of the parties amplified in many particulars, and the system so changed as to work with more facility than now antici-

[1] Watervale Min. Co. v. Leach (Ariz.), 33 Pac. Rep. 418-420.

pated."[1] It at least abandoned forever the idea of a royalty scheme of disposition of mineral lands.[2]

§ 104. The placer mining act of 1870.— The amendment of 1870, commonly called the Placer Mining Act,[3] was enacted mainly as supplemental to the act of 1866, extending the provisions of that act in respect to applications for patent to placer claims and all forms of valuable deposit.[4] It limited the area of the claim which might be patented to one hundred and sixty acres, and made the further provision, afterwards incorporated into the Revised Statutes of the United States, making possession for the time prescribed by the statute of limitation supply the place of proof of the location, in the absence of an adverse claim. This provision will be examined at length in another part of this work.[5] The essential features of this law will be examined at length in the appropriate places in this work, and it is therefore unnecessary for present purposes to present a detailed analysis of it. All the essential features of this act have been continued in force in the Revised Statutes of the United States, all the sections of which will be found in the Appendix.

§ 105. The statute of 1872 — The general system introduced thereby.— Inasmuch as the statute of 1872,[6] carried into the revision of the statutes of the United States, in connection with pre-existing statutes, as sections 2318 and 2352 both inclusive,[7] with the amendments which have been added thereto, constitute the federal statutory mining law as it exists to-day, and as we shall be compelled, in order to fully treat the question, to examine those statutes in detail under

[1] Yale, Mining Claims and Water Rights, pp. 9, 10.

[2] Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167.

[3] Act of July 9, 1870 (16 Stat. at L., p. 218).

[4] Deffeback v. Hawke, 115 U. S. 392; Moxon v. Wilkerson, 2 Mont. 421, 12 M. R. 602. See also St. Louis Smelting & R. Co. v. Kemp, 104 U. S. 636.

[5] *Post*, Part X, ch. IV.

[6] Act of May 10, 1872 (17 Stat. at L., p. 91).

[7] R. S. U. S. 1875, §§ 2318–2352.

the appropriate heads and sections, it will be unnecessary at this time to reproduce the statute in full or to even give a synopsis of it. The entire statute will be found in the Appendix. An examination of it will demonstrate that by it the congress of the United States, however imperfectly the entire scheme may by some be thought to be, announced a definite policy; abandoned the notion and theory of leasing sometimes thought of;[1] forever set at rest the royalty system desired by some,[2] and fixed upon the statute book a definite and certain policy. Many courts and many lawyers have affected to think the system imperfect, some say bad. Some do not agree with the new policy, for the first time given statutory life, of authorizing the pursuit of the vein on its downward course outside the vertical side lines of the location; others, however, do not see so great a fault in this provision. Moreover, the history of the times, with the great distance of the mining centers from the center of population in this country, the imperfect means of transportation and of communication between the points then as compared with now, furnished a reason for the truth that congress was but illy educated and slightly informed upon the true situation and the necessities of the occasion. Whence it follows that whatever crudities or shortcomings may exist in the law itself must be ascribed to this condition rather than a motive of opposition or carelessness or inattention on the part of congress.

A very able judge, thoroughly familiar with the situation, and who performed a great part in two states in moulding the judicial opinion on this question, has said: "Besides, we do not share in the opinion that the new system is so utterly bad. Nobody can pretend that it is perfect, but to our minds it is a great improvement on the system which it displaced. We are willing to admit that cases may arise to which it will be difficult to apply the law, but this only proves that such cases escaped the foresight of congress, or that, although they

[1] See *ante*, §§ 59, 60. [2] Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167.

foresaw the possibility of such cases occurring, they considered that possibility so remote as not to afford a reason for departing from the simplicity of the plan they chose to adopt. So far, the wisdom of the congressional plan has been sufficiently vindicated by experience. It is true that veins and ledges are not found to be perfectly regular in their formation — they have not a perfectly straight course even in depth, and near the surface they present still greater irregularities of strike and dip; but still they approximate the ideal vein that congress seems to have had in view sufficiently near to admit of an easy application of the law in all the cases of conflicting claims that have fallen under our observation."[1]

§ 106. The general purposes and features of the law of 1872.— The purpose of the act of 1866 was to authorize the location and possession of the public mineral lands, and to exclude foreigners, and especially Chinese, from such privileges, likewise imperfectly providing for a patent. The act of 1872, however, went still farther and dealt extensively with the manner of making a location, the size of claim, provided for annual labor and the manner of disposing of the public lands in the shape of mining claims, and authorized a final parting with the title by patent, specifying the conditions and circumstances under which it could be obtained, carefully protected the location, and provided for working as a condition of holding prior to patent. It also restricted the rights to citizens, or those who had declared their intention to become such, disclosing a policy throughout that only citizens, or those who had declared their intention to become such, were eligible to the privileges conferred.

It required in the application for patent and in making the location that end lines should be parallel. It demonstrated a policy which was left vague and indefinite by the

[1] Gleason v. Martin White M. Co., 13 Nev. 442–459.

law of 1866 as to what was intended to be acquired by location in the way of surface rights. Thus,—

§ 107. Radical differences between the law of 1866 and 1872 — The lode — The surface rights. — Whereas, by the law of 1866, the vein or lode was the principal thing located and the surface ground a mere incident, as repeatedly held by the courts,[1] under the law of 1872 this feature was radically changed, and the locator was given his block or wedge of earth,[2] and all veins or lodes the top or apex of which should be found within it; this, of course, and as held by the courts, and as the statute expressly provides, means not only the one upon which the discovery and location was made, but all veins of whatsoever kind or nature whereso-ever they might go, within the provisions of the law as construed by the courts, of which the locator had the top or apex.[3] Moreover, what had been vague and indefinite by the law of 1866 and 1870 was as clearly explained in the law of 1872 as the most sanguine or hopeful mining lawyer had any right to expect, considering the knowledge and experience of the legislators at that time.

[1] For a full discussion of this question see *post*, Part XI, ch. III.

[2] Id.

[3] See *post*, Part XI, ch. VII.

CHAPTER VI.

SUPPLEMENTAL STATE LEGISLATION.

§ 111. General features of state statutes.
112. The authority for statutes as expressed in the federal statute.
113. Value and force, likewise limitations upon state statutes.
114. Same — Some state statutes of doubtful validity.
115. Summary of competent state legislation.

§ 111. General features of state statutes.— All the precious metal bearing states and territories within what is popularly called the public domain,[1] which includes the territories of Arizona and New Mexico, and the states of California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Washington, Wyoming and Utah, have enacted more or less elaborate provisions embracing the questions of location and location work, discovery, preliminary notice, naming the claim, marking boundaries, and recording the claim; likewise providing for annual labor, and the manner and time of making proofs thereof, and some have provided the manner of forfeiting out a co-owner. But inasmuch as these statutes are given in full in the Appendix, and will be examined in detail under the appropriate heads, their contents will be omitted at this time. We will therefore content ourselves at the present writing with an examination into —

§ 112. The authority for state statutes as expressed in the federal statute.— Congress being the sovereign power in respect of the mineral lands, of course has, and may exercise, plenary authority concerning them. It may be considered as settled that the authority for state legislation upon this question is the same as that delegated to mining

[1] See *post*, Part III, ch. II.

districts,[1] and is found in that provision of the statute which, so far as material to the present inquiry, reads as follows: "The miners of each mining district may make regulations, not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." [2]

This, then, is a grant of power over a subject wherein the power of congress is supreme; and, notwithstanding the opinion of one court to the contrary,[3] we adopt the opinion of counsel in that case rather than the opinion of the court, and we think, with entire deference to the learned court, that the opinion of the counsel should have been followed, as it correctly stated the law. We reproduce it: "He who acquires mineral land from the general government cannot divest the grant of the conditions with which it passes. State constitutions can neither abridge the authority of an act of congress, nor strip it of the limitations and conditions it imposes. Congress is powerful, and may ignore, as it does, state constitutions, and, in broad terms, authorize local legislatures, regardless of the constitutions of the state, 'to provide rules for working mines;' rules 'involving easements,' securing the necessary ingress and egress to one mine over another, or other mineral lands, in working such mines." [4]

[1] In re Monk, 16 Utah, 100; Copper Globe M. Co. v. Allman (Utah, 1901), 64 Pac. Rep. 1019; Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. Rep. 130; Com'r Williamson to Hale, Sept. 25, 1880, Cop. Min. Lands (2d ed.), 290.

[2] R. S. U. S., § 2324.

[3] People ex rel. Aspen M. & S. Co. v. Dist. Ct. of Pitkin Co., 11 Colo. 147, 17 Pac. Rep. 298.

[4] Id., 17 Pac. Rep. 300. See *post*, §§ 1070-73.

The learned court overlooked the fact that this power was expressly reserved to the United States by the federal constitution,[1] and that therefore any attempt on the part of a state, either by constitutional or legislative provision, to go beyond the authority delegated, is absolutely null and void. The act under consideration in that case was the fifth section of the act of July 26, 1866, as continued in the Revised Statutes,[2] and presumably, for nothing appears to the contrary, that condition appeared in the patent under which the land was held. If so, that was the end of the matter — it was a right that congress had exercised and one beyond the power of a state legislature to interfere with. Of course, the state might extend the right of eminent domain over such subjects as the people by their constitution and laws permitted; but it was the evident intention of congress that the right should not be denied as to mining claims, whether patented or not, and that all customs should be given full force.

§ 113. Value and force, likewise limitations upon state statutes.— Congress having legislated upon the subject over which it has plenary power and authority, it manifestly and necessarily follows that state statutes must be strictly supplemental, that is, explaining or extending the provisions of congressional law, and under all circumstances only within the lines which congress has by express provision authorized the state legislature to enact.[3] Whence the further deduction, that any attempt on the part of a state legislature to pass laws relative to forfeitures of co-owners' interests, being a matter upon which congress has already legislated, would be absolutely void. As was said by the supreme court

[1] Const. U. S., art. IV, § 3, par. 2; Scott v. Sanford, 19 How. 615; Pollard v. Hagan, 3 How. 212; United States v. Late Corporation, etc. (Mormon Church), 136 U. S. 1, 34 L. ed. 478, 491.

[2] Act of July 26, 1866 (14 Stat. at L. 252); R. S. U. S., § 2338.

[3] Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. Rep. 130; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. Rep. 95.

of Montana in an early case, wherein the question under consideration was the provision of the territorial statute requiring the locator in recording his claim to verify the same under oath: "This is an additional burden imposed upon the locator of a mining claim by the territorial legislature. The original act creating the territorial government, provides that the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States; but no law shall be passed interfering with the primary disposal of the soil.[1] It is not necessary for us in this case to inquire whether the territorial legislature went beyond its constitutional authority in imposing these additional burdens upon locators of mining claims; but, if it did not, the closeness with which it trenched upon such authority may well be considered as a persuasive reason why the courts should so construe them that they shall not be more burdensome than can be reasonably helped."[2]

§ 114. Same — Some state statutes of doubtful validity. Several of the state legislatures have assumed to legislate upon matters regarding which congress has already enacted statutory provisions. For instance, in the states of Nevada, North Dakota, South Dakota and Wyoming, there are state statutory provisions undertaking to define the extra-lateral rights of the locator.[3] The statute of Wyoming is more nearly an exact copy of the federal statute,[4] and therefore is more nearly of some binding force and effect than either of the others. It is not necessary to make any extended comment here, in view of what was said in the last preceding section, upon the question of the validity of state statutes upon subjects already provided for by United States law.

[1] Citing R. S. U. S., § 1851; McCornick v. Varnes, 2 Utah, 355.

[2] Wenner v. McNulty, 7 Mont. 30; 14 Pac. Rep. 648. See also O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302; McCowan v. McLay, 16 Mont. 234, 40 Pac. Rep. 602.

[3] R. S. N. Dak. 1899, § 1434; Comp. Laws Nev. 1900, § 211; Laws S. Dak. 1887, § 2005; R. S. Wyo. 1899, § 2551.

[4] R. S. U. S., § 2322.

The legislators of Wyoming went a step or two farther than those of any other state, and undertook to say, copying again from the federal statutes,[1] that where claims have been held and worked for a period equal to the statute of limitation the owner shall be entitled to a patent.[2]

Wherever these statutes are exact reproductions of the federal law they are valuable for the purpose of informing the citizens of the state, fortunate enough to possess them, just what the United States law requires, and to that extent the spirit which prompted their enactment is commendable; but even then it would have been a considerable saving to the taxpayers for ink and paper, as well as a lighter pressure upon the mental machinery of the legislators, if they had contented themselves with the remark, in some appropriate part of the statutes of their state, "Comply with the United States law and you may have a patent for your mining claim."

There are also provisions in several of the state statutes to the effect that no location notice shall claim more than one location, and that a notice which does so is absolutely void in some states,[3] while in others it is provided that the location notice is void except as to the first claim described, valid as to it if it can be distinguished from the others, and void otherwise.[4]

As we will notice in a subsequent section,[5] the courts in all the best-reasoned cases wherein they have had occasion to consider the question, including the supreme court of Idaho, have held that where the boundaries of a claim are excessive, embracing more land than allowed by law, the claim, if otherwise valid, is good for the statutory amount, and void only as to the excess. And just why the lawmakers have seen fit to repudiate such a wholesome rule as this — for these statutes, if valid, amount to a repudiation — is not quite clear.

[1] R. S. U. S., § 2332.
[2] R. S. Wyo. 1899, § 2560.
[3] Idaho Laws 1899, § 8.
[4] Comp. Laws Nev. 1900, § 219; R. S. N. Dak. 1899, § 1440; Laws S. Dak., § 2011; R. S. Wyo. 1899, § 2589.
[5] See *post*, §§ 397–98 and notes.

We do not desire to be understood as contending that locators should be permitted to include more than one claim in a location notice, and we hardly think that any sane prospector would attempt to do so. But if such a contingency should arise, even in the states having this statutory provision, we apprehend that if the notice is sufficiently definite as to any claim sought to be described in it, and valid otherwise, a court would hesitate before declaring the notice entirely void, but rather that the notice would be held valid as to such claim, and void for the excess only.

§ 115. Summary of competent state legislation.— By the foregoing we do not mean to dispute the authority for state legislation on this subject. It is part of the system of mining law,[1] and within the lines authorized by congress it is not only competent for a state to act, but congress evidently intended that it would act. Such legislation has been repeatedly upheld by the courts everywhere, and it may now be considered as settled law.[2] As before indicated, however, such legislation is purely supplemental,[3] and must be strictly within the lines authorized by congress.[4] It is foreign to our present purpose and would involve repetition to state the provisions of these statutes at length, or to give in full the decisions made under them, as all will be considered at length under the appropriate heads and sections.

[1] Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. Rep. 130.

[2] Erhardt v. Boaro, 113 U. S. 527; Sisson v. Summers, 24 Nev. 379, 55 Pac. Rep. 829; Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1037; Oscamp v. Crystal River M. Co., 58 Fed. Rep. 293; Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 443; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. Rep. 95; Lockhart v. Wills (N. M.), 54 Pac. Rep. 336; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 652; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. Rep. 505; Pollard v. Shively, 5 Colo. 309.

[3] Eberle v. Carmichael, *supra;* Pollard v. Shively, *supra;* Sanders v. Noble, *supra.*

[4] Eberle v. Carmichael, *supra.*

CHAPTER VII.

SUPPLEMENTAL DISTRICT RULES.

§ 118. Distinction between district rules under the statute and those which existed prior thereto.
119. District rules authorized by law of congress — Special limitations — What they may contain.
120. The binding force and intrinsic value of district rules — Must be authorized, and must be reasonable in themselves — Must be obeyed.
121. Necessity of following local rules — Language of courts — Customs must also be lawful.
122. Writing — Immaterial whether district rules are in writing or parol — Mode of enactment immaterial.
123. Judicial notice — Courts will not take judicial notice of miners' rules — They must be proved.
124. District rules must be plain and specific — Must be within authority and must bind all.
125. Existence of rules must first be proved — Presumed to continue.
126. The district rules — Enactment a question of fact — How proved.
127. Same — Records parol.
128. District rules, what are — Question of fact.
129. Summary.

§ 118. Distinction between district rules under the statute and those which existed prior thereto.— The district rules authorized by the statute are closely allied in their force and effect to state statutes.[1] They form part of the present law of mining,[2] titles rest upon them, and more may be yet acquired.[3] Moreover, while in some parts of

[1] In re Monk, 16 Utah, 100, 50 Pac. Rep. 810; Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1037; Sissons v. Summers, 24 Nev. 379, 55 Pac. Rep. 829; Jupiter M. Co. v. Bodie M. Co., 11 Fed. Rep. 666; McCornick v. Varnes, 2 Utah, 355.

[2] Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. Rep. 130; Sullivan v. Hense, 2 Colo. 424; Dutch Flat Water Co. v. Mooney, 12 Cal. 534.

[3] Morton v. Solambo M. Co., 26 Cal. 527; Table Mountain Tunnel Co. v. Stranahan, 31 Cal. 387; Donohue v. Meister, 88 Cal. 121.

some states the district organizations have lapsed and have no longer any potential existence, there are other parts of states where the district organizations are preserved intact, either supplemental to or co-ordinate with state statutes, or as *quasi*-independent systems.

The difference between the rules and customs authorized by congress and those which before existed is in many instances most marked, in that any assumed authority beyond the limitations fixed by congress is, as a general rule, carefully avoided; and while many of the rules themselves remain the same in form, there is this distinction to be borne in mind with reference to them: those enacted since the statute rest upon the authority delegated by congress and are limited in respect to their potency thereby; while those existing prior to the statute, whether they exist from notions or suppositions of necessity as a corollary adjunct to mining everywhere, and are so observed, or whether they exist by reason of having been enacted by that solemn conclave — that American stannary parliament — the miners' meetings, they are recognized by the courts and by the law as of controlling influence in respect to mining claims. And it matters not what name is applied to them, whether it be customs, miners' rules and regulations or the by-laws of the district, they come to us not only in the humble garb of custom, but as an authoritative enunciation of the mining common law of the vicinage;[1] a different custom, it is true, from the immemorial custom so long recognized in England, but a custom none the less.[2]

§ 119. District rules authorized by law of congress — Special limitations — What they may contain. — The district rules, since the passage of the acts of congress of 1866 and 1872, are merely a continuation in many respects of the rules in force prior thereto, where not superseded by the laws of congress and the laws of the state or territory.

[1] King v. Edwards, 1 Mont. 235; Gleeson v. Martin White M. Co., 13 Nev. 442.

[2] See comment in Preface.

Under the law of congress[1] the district has the right to pass local laws, rules and regulations governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the requirements of the above law that the location must be distinctly marked upon the ground so that its boundaries can be readily traced, and all records of mining claims authorized by district rules or state statutes must refer to some natural object or permanent monument. Likewise the annual labor or improvements must not be less than one hundred dollars in value.[2]

§ 120. The binding force and intrinsic value of district rules — Must be authorized, and must be reasonable in themselves — Must be obeyed. — It is manifest from the foregoing that district rules, to be binding, must be within the letter and spirit of the authority granted by the law of congress; must not conflict therewith nor with state statutes. This narrows their scope. Where congress has acted there is no need for district rules. Where it has not, or has not authorized district rules or state statutes, it must be manifest that neither can be enacted or exist, for want of power.[3]

In recognizing and authorizing the continuance of local customs or district rules, congress meant just what the words implied: that the districts, where states or territories had not acted, might make laws, and such laws would be binding. Moreover, congress recognized the force and effect of miners' customs as they existed, and must be presumed to be mind-

[1] R. S. U. S., § 2324.

[2] Id.; Erhardt v. Boaro, 113 U. S. 537; Golden Fleece G. & S. M. Co. v. Cable Con. G. & S. M. Co., 12 Nev. 312; Leet v. John Dare S. M. Co., 6 Nev. 218; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Riborado v. Quang Pang. M. Co., 2 Idaho, 131, 6 Pac. Rep. 125.

[3] Hammer v. Garfield M. Co., 130 U. S. 291; Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182; Atwood v. Fricott, 17 Cal. 37; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906, 17 Colo. 243, 29 Pac. Rep. 173; Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413; Robertson v. Smith, 1 Mont. 410; Mallett v. Uncle Sam M. Co., 1 Nev. 188.

ful of the fact that titles rested upon them; and if reason were necessary, herein is to be found the reason for their existence and the authority for their continuance. Of necessity such customs, rules and regulations must be reasonable, and moreover be within the authority granted; they must be recognized and followed by miners, and have such universal application and receive such general observance as to give the miners the right to believe that all miners in the district do act and will act with reference to their provisions, and obey them.[1] It will thus be seen that while the miners' rules and regulations, prior to the statute, could be much broader and more comprehensive in their scope and effect, being circumscribed only by the general requirement that they do not conflict with natural right nor the general laws of the country, nor its constitution, and likewise that they are reasonable within themselves, those under the federal statute, in addition to this limitation, are restricted in their operation and value still further, in that, as before noted, they must not be contrary to the authority granted by congress. In fine, then, mining customs, rules and regulations, when not in conflict with state or national law, and when reasonable in themselves, must be complied with.[2]

[1] Glacier Mountain Silver M. Co. v. Willis, 127 U. S. 471; Broder v. Natoma W. & M. Co., 101 U. S. 274; Chambers v. Harrington, 111 U. S. 350; s. c. *sub nom.* Harrington v. Chambers, 3 Utah, 94; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. Rep. 95; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Becker v. Pugh, 9 Colo. 589; Sullivan v. Hense, 2 Colo. 422; Con. Rep. M. M. Co. v. Lebanon M. Co., 9 Colo. 343, 12 Pac. Rep. 212; Harvey v. Ryan, 42 Cal. 626; King v. Edwards, 1 Mont. 235; Jupiter M. Co. v. Bodie Con. M. Co., 11 Fed. Rep. 666; Prosser v. Parks, 18 Cal. 47; Noonan v. Caledonian M. Co., 121 U. S. 393.

[2] Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. Rep. 753–802; King v. Edwards, 1 Mont. 235; McCornick v. Varnes, 2 Utah, 355; Gleeson v. Martin White M. Co., 13 Nev. 442; Harvey v. Ryan, *supra;* Rosenthal v. Ives, and Lansdale v. Ives, 2 Idaho, 244, 12 Pac. Rep. 904; Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; Orr v. Haskell, 2 Mont. 325; Hess v. Winder, 30 Cal. 349; Merritt v. Judd, 14 Cal. 64; English v. Johnson, 17 Cal. 107; St. John v. Kidd, 26 Cal. 263; Titcomb v. Kirk, 51 Cal. 288; Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418; Erhardt v. Boaro, 113 U. S. 527.

§ 121. Necessity of following local rules — Language of courts — Customs must also be lawful. — It may be laid down as axiomatic, and the supreme court of the United States and the land department of the government have always acted upon the theory, that mining locations, as a general rule, are governed by local rules and customs, wherever the location was made prior to statute; and that where made subsequent to statute it will be presumed, in the absence of a showing to the contrary, that local customs and the statute have been complied with.[1] It is necessary that this should be so in order to preserve a uniformity of decision and opinion. It is likewise necessary that there should be an actual compliance with the laws, not only federal but such local rules as obtain and are recognized in the district.[2] The supreme court of Idaho states the general rule clearly, and while it repeats to some extent what is already stated, we reproduce it as a correct statement of the law: "Rules and customs of miners, reasonable in themselves and not in conflict with any higher law, have long been recognized and sanctioned by legislative enactments and judicial decisions. That such rules may still be adopted and enforced as part of the law of this country is too well settled to admit of argument. We cannot see that the custom in question (a custom limiting all placer claims in the district to eighty rods in length) in any way conflicts with either the acts of congress or the laws of the territory, but, on the contrary, we think the custom a reasonable one and entirely in harmony with the spirit of the laws."[3] It is not enough that certain customs are recognized and considered binding upon

[1] Robertson v. Smith, 1 Mont. 410; Atchison v. Peterson, 20 Wall. 507; Glacier Mountain Silver M. Co. v. Willis, 127 U. S. 471; Jennison v. Kirk, 98 U. S. 452; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350; Basey v. Gallagher, 20 Wall. 670.

[2] Gleeson v. Martin White M. Co., 13 Nev. 442–464; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[3] Rosenthal v. Ives, and Lansdale v. Ives, 2 Idaho, 244, 12 Pac. Rep. 904. See also St. Louis S. & R. Co. v. Kemp, 104 U. S. 52; Gropper v. King, 4 Mont. 367, 1 Pac. Rep. 755.

the miners of the district, but they must also be lawful. For example, the commission of a trespass can never be permitted under the sanction of custom; and it matters not that long silence may imply license by the upper quartz miner or mill man to permit his debris to float upon the lower one, it is nevertheless unlawful. So, allowing the debris from a mine to drift down the stream, and fill the natural channel, thereby causing the water and sand to spread over the country, and polluting the waters of said stream, cannot be justified by custom; and, unless authorized by statute, it will be restrained.[1]

§ 122. Writing — Immaterial whether district rules are in writing or parol — Mode of enactment immaterial. Since the vital and material question respecting miners' rules and customs is, as we have seen, whether they are in force and generally understood and obeyed, and whether from that miners will be presumed to have acted with reference to them, it is quite immaterial by what means they were enacted or brought into existence; whence it follows that courts will not inquire into the regularity of the enactment of district rules.[2] It is sufficient, and as far as the court will inquire, that they are generally understood to be in force and so observed. It is also immaterial whether they are in writing or rest in the common knowledge of the miners.[3] Thus, mining district rules may be shown to be in force by custom or usage without proof of formal adoption by written record.[4] To be recognized, however,

[1] Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. Rep. 753; Lincoln v. Rogers, 1 Mont. 217.

[2] Gore v. McBrayer, 18 Cal. 582.

[3] Flaherty v. Gwinn, 1 Dak. Ty. 509; Campbell v. Rankin, 99 U. S. 261; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522, 6 Sawy. 299; Jupiter Con. M. Co. v. Bodie M. Co., 11 Fed. Rep. 666, 673; Gore v. McBrayer, *supra;* Pralus v. Pacific G. & S. M. Co., 35 Cal. 30; Harvey v. Ryan, 42 Cal. 626; Coleman v. Clements, 23 Cal. 245; King v. Edwards, 1 Mont. 235; Golden Fleece M. Co. v. Cable Con. G. M. Co., 12 Nev. 312; Roberts v. Wilson, 1 Utah, 292.

[4] Flaherty v. Gwinn, *supra.*

a mining district rule must not only have been enacted or adopted or admitted to exist, but it must be so recognized and followed by the miners;[1] but mining customs are not like common-law customs, and need not be shown to have been of long duration;[2] they cannot override state or national laws.[3]

§ 123. Judicial notice — Courts will not take judicial notice of miners' rules — They must be proved. — From the foregoing it is quite apparent that the existence of miners' rules and regulations, like statutes of foreign states, must be proved, and that the courts will not take judicial notice of them.[4] Judge Hallett, when chief justice of Colorado, tersely stated the rule, which has everywhere been followed, to the effect that judicial notice cannot be taken of the rules, usages and customs of mining districts; they must be proved at the trial, like any other fact, by the best evidence that can be obtained respecting them. And he briefly states the reason of the rule in the following language: "To say that the court is advised as to the nature and extent of such regulations is contrary to the fact, and therefore they cannot be the subject of judicial notice."[5] And if no proof is made as to a custom upon a particular point the court will not assume its existence.[6]

[1] Jupiter M. Co. v. Bodie Con. M. Co., 11 Fed. Rep. 666.

[2] Yale, Mines, p. 86; Smith v. North Amer. M. Co., 1 Nev. 357; Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; King v. Edwards, 1 Mont. 235.

[3] Sweet v. Webber, 7 Colo. 443, 4 Pac. Rep. 752; Jupiter M. Co. v. Bodie Con. M. Co., *supra;* McCornick v. Varnes, 2 Utah, 355. And a regulation of a mining district requiring more work to be done than required by United States law has been held to be void. Original M. Co. v. Winthrop, 60 Cal. 631. But see Packer v. Heaton, 9 Cal. 568; McGarrity v. Byington, 12 Cal. 426.

[4] Sullivan v. Hense, 2 Colo. 424; Harvey v. Ryan, 42 Cal. 626; Flaherty v. Gwinn, 1 Dak. Ty. 509; Parley's Park S. M. Co. v. Kerr, 130 U. S. 256; Sussenbach v. First Nat. Bank, 5 Dak. Ty. 477, 41 N. W. Rep. 662; Coleman v. Clements, 23 Cal. 245.

[5] Sullivan v. Hense, *supra.*

[6] Perigo v. Erwin, 85 Fed. Rep. 904.

§ 124. District rules must be plain and specific — Must be within authority and must bind all.— Not to repeat too much, but to reconcile what might seem to be a conflicting statement in the preceding section, it is proper to observe that, to protect a location, the presumption would be indulged that it is properly made, in the absence of a showing to the contrary; but were some authority relied upon different from or beyond that conferred by the federal statute, as existing in local rules or the like, the existence of such authority must be established and will not be presumed. For obvious reasons district rules imposing conditions upon miners in addition to those imposed by the statutes of the United States, or conferring rights in enlargement of those statutes, must be clear and positive in their character, and not rest upon inference or presumption merely.[1] While local rules and regulations, within the limits pointed out, are authorized and may be relied upon to protect the miners' rights, it is essential to their validity that they have a potential existence, either by specific enactment and observance and obedience by the miners, or by common consent, as of natural right.[2] For a still stronger reason, these rules and regulations, to be of value, must not apply merely to a portion of a district,[3] but must be of general application and must be binding and obligatory upon all.[4]

§ 125. Existence of rules must first be proved — Presumed to continue.— Since, as we have seen, judicial knowledge cannot be taken of district rules and regulations, it must follow as a necessary corollary from what has been

[1] Flaherty v. Gwinn, 1 Dak. Ty. 509; Mallett v. Uncle Sam M. Co., 1 Nev. 188; Robertson v. Smith, 1 Mont. 410.

[2] Erhardt v. Boaro, 113 U. S. 527; Jackson v. Roby, 109 U. S. 440; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Con. Rep. Mt. M. Co. v. Lebanon M. Co., 9 Colo. 343.

[3] King v. Edwards, 1 Mont. 235.

[4] Flaherty v. Gwinn, *supra;* Jupiter M. Co. v. Bodie M. Co., 7 Sawy. 96, 11 Fed. Rep. 666; Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383.

said, that before any right can be asserted which has for its support or foundation a district rule, custom or regulation, the rule itself must be established by competent proof, which must show that it is enforced and observed in the district by being universally observed, obeyed and acquiesced in. And it is not sufficient that it be shown that such a rule once existed, but it must be shown to be in force and observed at the time it is relied upon.[1] But agreeable to general principles of the law, when mining rules and customs are once shown to be in force, they are presumed to continue in force, and the burden would be upon the person attacking their validity or existence in such case to show that they had fallen into disuse and ceased to be observed to the extent that miners in the district no longer acted with reference to them.[2] And where it is claimed that a forfeiture has resulted from a failure to comply with local rules, the rule itself must not only be proved, but the forfeiture must likewise be established, and must, moreover, be pleaded.[3]

§ 126. The district rules — Enactment a question of fact — How proved.— From the foregoing it would seem scarcely necessary to add the proposition of law which has become axiomatic, namely, that the existence or non-existence of miners' rules or customs is always a question of fact, but their construction and validity when established is a question of law for the court.[4] The mode of proof, of

[1] Strang v. Ryan, 46 Cal. 83; Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; Sussenbach v. First Nat. Bank, 5 Dak Ty. 477, 41 N. W. Rep. 662; Dutch Flat Water Co. v. Mooney, 12 Cal. 534; Blake v. Butte Silver M. Co., 2 Utah, 54; St. John v. Kidd, 26 Cal. 263; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Harvey v. Ryan, 42 Cal. 626; Table Mt. Tunnel Co. v. Stranahan, 20 Cal. 198; Ralston v. Plowman, 1 Idaho, 595; Roach v. Gray, 16 Cal. 383.

[2] Riborado v. Quang Pang M. Co., 2 Idaho, 131, 6 Pac. Rep. 125; North Noonday M. Co. v. Orient M. Co., *supra;* King v. Edwards, 1 Mont. 235.

[3] St. John v. Kidd, *supra;* Morenhaut v. Wilson, 52 Cal. 268.

[4] Parley's Park Silver M. Co. v. Kerr, 130 U. S. 256; Sullivan v.

course, is governed by the ordinary rules of evidence, and it would seem, from the weight of authority and reason, that mining district rules or regulations upon a particular point must be offered in evidence as a whole; must be proven by the best evidence, and must be proved by the books themselves, properly produced, if there are books, or by the production of such other paper evidence as there may be of their existence. If there are no books, and the rules are not in writing, they may of course be proved by any competent evidence, the same as any other fact.[1] The land department accepts proof of mining district rules by a certified copy of the rules or by-laws attested by the seal of the district and the seal of the recorder or other legal custodian. If no proof is made of a custom or by-law upon a given point, the court will assume, for the purposes of the trial, that none exists.[2]

§ 127. **Same — Records parol.**— Suggestions have appeared in the foregoing indicating that miners' rules and customs may in general be proved by any competent evidence agreeable to general rules. Manifestly, therefore, they may be proved by the records themselves;[3] indeed, this has been said to be the best evidence.[4] But while this is true, and while a duly authenticated copy, agreeably to the rule in the land department, and that governing the admissibility of records generally, may in a proper case supply the place of the original, that is not the only way of prov-

Hense, 2 Colo. 424; Poujade v. Ryan, 21 Nev. 449; Harvey v. Ryan, 42 Cal. 626; King v. Edwards, 1 Mont. 235; Jupiter M. Co. v. Bodie M. Co., 11 Fed. Rep. 666; Golden Fleece M. Co. v. Cable M. Co., 12 Nev. 312; Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

[1] English v. Johnson, 17 Cal. 107; Roberts v. Wilson, 1 Utah, 292; Campbell v. Rankin, 99 U. S. 261; Pralus v. Pac. G. & S. M. Co., 35 Cal. 30; Doe v. Waterloo M. Co., 70 Fed. Rep. 455; St. John v. Kidd, 26 Cal. 263.

[2] Marshall v. Harney Peak M. Co., 1 S. D. 350; Perigo v. Erwin, 85 Fed. Rep. 904.

[3] St. John v. Kidd, 26 Cal. 263; English v. Johnson, 17 Cal. 107; Roberts v. Wilson, *supra;* Orr v. Haskell, 2 Mont. 225.

[4] Campbell v. Rankin, 99 U. S. 261.

ing them.[1] The rule is firmly established that they may be proved by any one familiar with them and competent, if not in writing, to testify, the same as any other matter in parol.[2] And parol evidence is admissible to show that written rules have fallen into disuse.[3] Unless the particular right in question is dependent for its force and validity upon the existence of a district rule, it is not necessary to plead it.[4]

§ 128. District rules, what are — Question of fact.— What are and what are not district rules being thus made matter *in pais*, it necessarily follows that their existence or non-existence, when called in question, become matters of fact, to be determined as such by the court or jury, the same as any other fact in the case.[5] But when established their validity becomes a question of law for the court;[6] but this inquiry, as we have seen, only extends to the question whether they are reasonable,[7] or are not contrary to the statute of the United States[8] or of the state or territory.[9]

§ 129. Summary.— In the foregoing sections we have attempted to demonstrate those principles of mining law which have for ages, in many countries, guided the operations of men engaged in mining, defined their rights and furnished the mode of redressing their wrongs. And from

Flaherty v. Gwinn, 12 M. R. 605; Campbell v. Rankin, 99 U. S. 261.

[2] Coleman v. Clements, 23 Cal. 245; Ralston v. Plowman, 1 Idaho, 595; Flaherty v. Gwinn, *supra;* Waring v. Crow, 11 Cal. 366; Harvey v. Ryan, 42 Cal. 626; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 7 Sawy. 96; Leet v. John Dare M. Co., 6 Nev. 218; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522, 6 Sawy. 299; Campbell v. Rankin, *supra.*

[3] King v. Edwards, 1 Mont. 235; Leet v. John Dare M. Co., *supra.*

[4] Coleman v. Clements, *supra.*

[5] Harvey v. Ryan, 42 Cal. 626; Sullivan v. Hense, 2 Colo. 424; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 7 Sawy. 96; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522, 6 Sawy. 299; Campbell v. Rankin, 99 U. S. 261.

[6] Ralston v. Plowman, 1 Idaho, 595.

[7] King v. Edwards, 1 Mont. 235.

[8] Jupiter M. Co. v. Bodie Cons. M. Co., *supra;* McCornick v. Varnes, 2 Utah, 355.

[9] Barnes v. Sabron, 10 Nev. 217.

it all we glean these deductions: That the western system of mining law enforced throughout the precious metal-bearing mining states and territories of the United States had its birth, for the greater part, primarily in the laws in force in Mexico and other Spanish-American countries prior to the cession of California and the other Pacific coast possessions to the United States; but at the same time, the customs and laws in force in at least four counties in England, and in some countries on the European continent, played an important part in furnishing the elementary principles upon which our law is based, partly by direct application and from being copied directly into the miners' rules and regulations, and partly through the fact that substantially the same principles and rules existed in the Mexican ordinances.

Our mining system, then, at the present time in the United States, is composed of two distinct yet closely allied systems:

1. Those changeless principles of the common law which are the same everywhere, and which furnish in many respects the final test by which rights are to be measured and adjusted, wrongs redressed, statutes interpreted and enforced, and men's rights everywhere protected and adjusted upon the same standard.

2. The federal statute and the decisions made under it, which in turn is composed of three elements, namely: (*a*) the statute itself; (*b*) the supplemental state statutes authorized by it; (*c*) the district rules, not only those authorized by the statute and subordinate to it, but those existing prior thereto, and recognized thereby, and upon which many titles rest, and under which many rights may be asserted and wrongs redressed.

This comprehensive system, then, thus shown to be in existence will be examined in detail in the further pages of this work.

PART III.

OF THE LANDS OPEN TO EXPLORATION, APPROPRIATION AND PURCHASE AS MINES—DEFINITIONS.

CHAPTER I.

DEFINITIONS OF MINES, MINING AND MINERAL LANDS.

§ 131. Preliminary observations.
132. Historical summary of mining.
133. Precious metal mining in California.
134. Mining — Definition of.
135. Hydraulic and placer mining — Lawful enterprise — Debris to be cared for.
136. Mining in Spanish-America and Mexico.
137. Mining in England.
138. Early mining of copper.
139. Lead, zinc, iron and coal.
140. Mine — Definition of.
141. The old distinction between mine and quarry.
142. Distinction between open and unopened mines.
143. Minerals defined — Mineral lands.
144. Land office decisions — Special enumeration of minerals.
145. Petroleum lands specially recognized.
146. Same — Petroleum and natural gas minerals and part of the soil.
147. Salt springs, lakes, ponds and saline lands.
148. Review of the chapter.

§ 131. Preliminary observations.— Having ascertained the source and present condition of the governing principles which control mining operations, and therefore constitute mining law, it becomes material to inquire into the character and scope of the materials and the land to which those rules apply. Likewise to define, at considerable length, the component elements which make up the mass of matter comprehended by and included in the terms "mines," "minerals"

and "mineral lands;" also to define at some length the restricted, and at the same time comprehensive, meaning of the term "mining," as we shall have occasion to deal with it. We shall therefore examine the subject under consideration in a somewhat inverse order from the above manner of statement.

§ 132. Historical summary of mining.— The history of mining is the history of civilization, and that it has been carried on in some form from a very early period in that history is attested not only by history itself but by the quantity of metallic substances, such as gold, silver and copper, which have been produced and used in the arts, and as money, from very early times. The large quantities of gold and silver found in Mexico and Peru after their conquest by Spain stimulated an extensive search for those metals, which was amply rewarded in both those countries and other Spanish-American possessions to the extent that in less than one hundred and fifty years Spain became the wealthiest civilized country of the earth.[1] Mining has been carried on extensively in England, certainly since the Roman invasion, and in one form or another it has formed an important industry in not less than twenty-two counties in England alone. The production of those mines includes gold, silver, copper, lead, tin, zinc, iron and coal, besides many other minerals which the purpose of this work does not require mentioning. Mining was carried on in many parts of the Appalachian range from Nova Scotia to Georgia, and it was carried on quite extensively in Georgia, North Carolina, Virginia, South Carolina and in Nova Scotia, that is, for the precious metals. Coal and iron have been mined more or less in nearly every state of the Union.[2]

§ 133. Precious metal mining in California.— The late Mr. Justice Field, whose knowledge of mining law was world-

[1] Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167.

[2] See historical matter, *ante*, Parts I and II. See also *post*, § 138.

wide, and whose familiarity with the early history of California justifies us in ascribing to him the position of an oracle thereon, gives a splendid statement of the miners, their rules and habits in early days as follows: "Soon after the discovery of gold in California, as is well known, there was an immense emigration of gold seekers into that territory. They spread over the mineral regions and probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules prescribing the conditions upon which mining ground might be taken up; in other words, mining claims be located and their possession secured. These rules were so framed as to give to all immigrants the absolute equality of right and privilege. The extent of ground which each might locate, that is, appropriate to himself, was limited, so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there buried in the earth. But a few months' experience in the precarious and toilsome pursuit drove great numbers of the miners to seek other means of livelihood and fortune, and they therefore disposed of their claims. They never doubted that their rights could be transferred so that the purchaser would hold the claim by an equally good title. Their transferable character was always recognized by the local courts, and the title of the grantee enforced. Many individuals thus became the possessors of claims covering ground taken up by different locations, and the amount which each person, or association of persons, might acquire and hold was only limited by his or their means of purchase."[1]

§ 134. Mining—Definition of.—Mining in its general and at the same time restricted sense, as we shall employ it in this work, comprehends and includes the digging and searching for precious and economic metals and minerals, whether by shafts, pits and tunnels, or by hydraulic gravel mining, or the quarrying of building stone, marble and slate. It

[1] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636.

also includes the mining of coal, iron, phosphate and hydrocarbons, and the boring for oil and gas, as well as prospecting for any of those metals or minerals, but excludes digging or boring for water solely, and making openings or cuts for railways, or other means of general transportation otherwise than to and from the substance of the mine itself.[1] Mining has been described as a species of trade.[2]

§ 135. Hydraulic and placer mining — Lawful enterprise — Debris to be cared for.— Generally it would seem a contradiction of terms to call ordinary placer mining, mining

[1] Mining is thus defined by a leading work: "The art of mining consists of those processes by which useful minerals are obtained from the earth's crust. This definition is wider than what is popularly known as mining, for it includes not only underground excavations but also open workings; at the same time it excludes underground workings which are simply used for passages, such as railway tunnels and sewers, and galleries for military purposes. We must remark also that the word 'mine,' or its equivalent in other languages, varies in signification in different countries on account of legal enactments or decisions which define it. Thus, in France and Belgium the workings for mineral are classified by the law of 1810, according to the nature of the substance wrought, into mines, *minieres, et carrires*. In the United Kingdom, on the contrary, it is the nature of the excavation which decides the question for certain legislative purposes, and the term 'mine' is restricted to workings which are carried on underground by artificial light. The consequence is that what is merely an underground stone quarry in France becomes a true mine in England, whilst the open workings for iron ore, such as exist in Northamptonshire, would be true mines under the French law. It is necessary, therefore, in an article on mining, to go beyond the English legal definition of a mine, and include the methods of working minerals in excavations open to daylight, as well as in those which are purely subterranean. Furthermore, as it is customary for the miner to cleanse his ore to a greater or less extent before selling it to the smelter, we shall treat under the head of mining those processes which are commonly known as the dressing or mechanical preparation of ores; and finally, a few remarks will be made concerning legislation affecting the mines in the United Kingdom, accidents in mines, and the production of the useful minerals in various parts of the globe." Enc. Brit., vol. XVI, p. 459, article "Mining."

[2] Bainb. Mines, p. 326; Storey v. Lord Windsor, 2 Atk. 633; Lawton v. Lawton, 3 id. 16; Tredwen v. Bourne, 6 M. & W. 461.

at all, and yet it is mining, inasmuch as it is the removal of the alluvial deposits on the earth's crust from the position in which nature left them. In a comprehensive sense hydraulic mining is mining by means of the application of water under pressure through a nozzle against a natural bank.[1] There are certain essentials to the practical performance of all hydraulic operations; water must be obtained in large quantities and stored in tanks or reservoirs in such a position and altitude above the bank or deposit against which it is applied as to acquire a natural force and pressure in its descent.[2] Therefore, water rights are essential, and the water ditch and canal and its use are an essential part of the recognized system by which hydraulic mining is and always has been conducted on the Pacific coast.[3]

Placer mining differs only from hydraulic mining, as now operated, in that the gravel and alluvial deposit is dug from its natural position by means of picks, shovels and other tools and washed in a sluice box or rocker, to which it is removed by means of artificial transportation. While hydraulic mining has occasioned considerable dispute in California in consequence of the debris being washed into and impeding the flow of the rivers, it is nevertheless a leading and important industry in the state and may lawfully be carried on under proper restrictions;[4] but the statutes regulating the deposit of debris have been declared constitutional,[5] and it may now be considered as settled that the hydraulic miner is bound at his peril to properly care for his debris the same as the coal miner or the ordinary mill man.

§ 136. Mining in Spanish-America and Mexico.— Naturally and necessarily the operation of mines and reduction

[1] Civil Code of Cal., sec. 1425; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243.

[2] Jacob v. Day, *supra*.

[3] Jennison v. Kirk, 98 U. S. 453; Jacob v. Day, *supra*.

[4] North Bloomfield Gravel M. Co. v. United States, 88 Fed. Rep. 654; Woodruff v. North Bloomfield Gravel M. Co., 58 Fed. Rep. 625.

[5] See cases in last preceding note. See also Act of March 1, 1893 (27 Stat. at L. 507); Ball v. Tolman, 119 Cal. 358, 51 Pac. Rep. 546.

works connected therewith within the dependencies of Spain and Spanish-America — formerly comprehended by the terms New Spain, the Indies and Mexico — required the establishment and recognition of an elaborate system of mining jurisprudence; likewise the recognition of such essential customs as experience had demonstrated to be necessary to aid in the interpretation and execution of the mining laws and ordinances. It would serve no useful purpose to review these ordinances at length, and we have already reproduced such of the essential features as constituted a portion of the elementary principles of our law.[1] It is sufficient to say that they covered every point from time to time that the experience of two hundred years in mining under a comparatively progressive spirit seemed to warrant. We have already seen, in a general way, that there were ample provisions for mining concessions under certain circumstances, reserving always a royalty to the crown, agreeably to the rule of the civil law, which was the parent of the Spanish law of that time. Provisions were made for securing mining ground, as already seen, and there were provided courts of justice of first instance and appeal; and were it not for the exorbitant tax exacted, it would seem that the arrangement constituted a perfect government over the subject of mining.[2]

Señor Gamboa, the very able law-writer of the eighteenth century, in commenting upon these ordinances and the elaborateness of the mining arrangement, observes "that these ordinances and laws were drawn not only from the experience of Spain, but from the ripe experience of Continental Europe besides. And although in the space of one hundred and seventy-six years, since 1584, the date of their promulgation, the disputes concerning mines which the thirst for gain has excited have been most frequent, and although the mining districts of this kingdom are very nu-

[1] *Ante*, §§ 50, 51 *et seq.*

[2] Rockwell's Spanish and Mexican Law, pp. 116, 127; Gamboa's Com., ch. 1.

merous, it does not seem that any want of a new system has ever been felt."[1]

§ 137. Mining in England.— We have already adverted, in a general way, to the extensive mining operations which have for many centuries constituted a leading industry in many parts of England. The purpose of this work would be incomplete if we did not give at least the key which would furnish the means of further examination into this subject. Speaking of the importance of the mining industry, a leading work justly observes: "Next to agriculture, first foundation of the wealth of all countries, the material resources of England lie in its minerals. The earliest traces of its mineral riches appear in the visits of men from the Mediterranean, who braved the dangers of unknown seas to gather the tin of Cornwall."[2]

§ 138. Early mining of copper.— The first copper mining of any considerable importance in the United States seems to have been carried on on the borders of Lakes Michigan and Superior, within the states of Michigan and Wisconsin, though some mining, but mostly iron, has been carried on in the state of Minnesota. With the possible exception of Montana and Arizona, the largest deposits of copper in the United States have been found on the coast of Lake Superior, within that portion of the state of Michigan known as the Upper Peninsula. These copper deposits were certainly known very early in the eighteenth century. They began to attract attention in the latter part of that century, so much so that on April 16, 1800, congress authorized the president to employ an agent to collect information on the subject, and "to ascertain whether the Indian titles to such lands as might be acquired for the use of the United States, in case they should deem it expedient

[1] Commentaries on the Mining Ordinances of Spain, by Don Francisco Xavier de Gamboa, published in 1806, *sub nom.* Novisima Recopilacion, written in 1759–1760. See also Ivanhoe M. Co. v. Keystone Con. M. Co., 102 U. S. 167.

[2] Enc. Brit., vol. 8, p. 204.

to work said mines, had been extinguished." It is a matter of history that the Indian title was not extinguished until the treaty with the Chippewas in 1843, and it was not until 1845 that systematic mining in the copper regions was commenced. In 1845 the total production of copper in the United States was estimated at one hundred tons.[1] The total production from 1776 to 1851 is estimated at six thousand tons.[2] Within the last few years, however, the demand for copper has greatly increased, which of course has stimulated the search for, and mining and reduction of it. So large has this industry grown, that the output for 1898 was over two hundred and thirty thousand tons, valued at more than sixty-five millions of dollars. The production for the years 1899 and 1900 are not at hand, but exceed by several million dollars the above figures.

§ 139. Lead, zinc, iron and coal.— Lead mining, prior to the discovery of the large galena deposits in the Rocky Mountains and in the intermountain basin, was largely carried on, principally indeed, within the United States, in what was formerly called the Indian Territory, in that portion of the country now forming the states of Illinois, Wisconsin, Iowa and Missouri. It was here that the early disputes as to leasing lead mines arose.[3]

Zinc was mined in Missouri as early as 1720, and there is authority for believing that the discovery was made as early as 1702, while Missouri was still a French colony.[4]

Iron has been found, and extensively mined, within the states of Pennsylvania, New York, Alabama, Minnesota and Wisconsin, although it pervades to a greater or less extent the entire Appalachian system, and is lately becoming an

[1] Mineral Industry, vol. 1, p. 108; Lindley, Mines, § 32.

[2] Trans. Amer. Inst. Mining Eng., vol. 11, p. 8.

[3] United States v. Gear, 3 How. 133; United States v. Gratiot, 14 Pet. 526; s. c., 1 McLean, 454 (Fed. Cas. No. 15,249); 2 Stat. at L., p. 448; Indiana v. Miller, 3 McLean, 151, 13 Fed. Cas. 25; Wilcox v. Jackson, 13 Pet. 498.

[4] Trans. Amer. Inst. Min. Eng., vol. 11, p. 8.

important industry in Colorado, Utah, Idaho and Montana, and the Territory of Arizona.

Coal beds, of more or less thickness, seem to underlie the greater part of the upper Mississippi Valley, while coal mining is a leading industry in Pennsylvania, Utah and Wyoming, and an important one in Colorado. Coal mining is also carried on in Alabama, West Virginia, Ohio, Indiana, Illinois, Iowa, Missouri and Kansas. The mode of acquiring title to coal and iron land, with the exception of the iron which lies in deposits or in veins, is usually different from that of acquiring other land. Coal is special, made so by statute. Both will be considered at appropriate places in this work.[1]

Clays, kaoline and similar deposits, as also phosphates, have lately attracted attention, and thus far have been mined in many of the states. Wherever they are found in the precious metal-bearing states, or public-land states, title may be acquired to them the same as to placer or other alluvial deposits.

§ 140. Mine — Definition of.— The term "mine" is one of broad signification, not only in common literature, where it includes almost every form of removing the earth's crust from its natural position, but also in its technical sense, as understood in mining law. As we shall use it, and as it is understood in mining law, the word is sometimes a verb and sometimes a noun. It comprehends not only the tunnel, shaft, drift, adit, or other opening in the earth, made for the purpose of procuring or prospecting for metals or minerals, but also the body of metals, minerals, ores, or mineral-bearing earth therein. It also sometimes means the entire mass of land composing a mining claim. Thus, we speak of a collection or group of claims composing a mining claim as a mine. Under the foregoing comprehensive definition it is proper to say, and it necessarily follows, that a

[1] For a discussion of the subject of coal lands, and the manner of acquiring title to them, see *post*, § 700 *et seq.*

quarry, contrary to the old rule, would be a mine; and this would be true in practice, because in some parts of the iron regions of New York, Pennsylvania, Minnesota and Utah, the iron ore is literally quarried from the banks or beds as stone would be quarried. This is a distinction and a departure from the old rule, as we shall see further on, but it is none the less true. Likewise, this term would include both the ground and the excavation made by the operation of placer and hydraulic mining. Thus, a reservation of mines and minerals has been held to include everything below the surface and the right of quarrying as well as mining,[1] and underlying seams or strata have been held to constitute a single mine; but this, of course, would be where there had been no severance of the different strata.[2] Early authority exists laying down the principle that it is sometimes a question of fact whether an opening is a mine or a quarry.[3]

§ 141. The old distinction between mine and quarry.— A distinction existed, however, as formerly understood, and as given in the older works on mining law, between a mine and a quarry. Thus, according to Mr. Bainbridge, a mine is formed by the penetration of the surface, without exposure of the works to the light of day, by means of pits, shafts, levels or tunnels; and in the case of coal mines, by shafts, slopes and drifts. This word is said to be derived from *minare*, signifying *ducere*, to lead or draw with reference to subterranean passages.[4] Thus, in the early cases, it was decided that the word "mine" usually imports a cavern or subterraneous place containing metals or minerals, and not a quarry[5]

[1] Midland Ry. Co. v. Checkley, L. R. 4 Eq. 19; Brady v. Brady, 65 N. Y. S. 621.

[2] Spencer v. Scurr, 31 Beav. 334, 10 Morr. M. R. 388, 31 L. J. Ch. 122, 334; Elliot v. Rokeby, L. R. 7 App. Cas. 43; Clavering v. Clavering, Mos. 219, 14 M. R. 358.

[3] Rex v. Sedgley, 2 B. & Ad. 64.

[4] Bainb. Mines (1st Am. from 3d London ed.), p. 2; De Fooz, Mines, p. 59.

[5] Listowell v. Gibbings, 9 Irish C. L. 223; Darvill v. Roper, 3 Drew. 294; Rex v. Alderbury, 11 East, 534; Hext v. Gill, L. R. 7 Ch. App. 699. Compare Brown v. Chadwick, 9 Irish L. R. (N. S.) 101; Bell v. Wilson, L. R. 1 Ch. App. 303.

A quarry was said to be an open excavation where the works are visible at the surface. The word is supposed to be derived from *quadra tarius*, a stone cutter or squarer.[1] Thus, it would appear that the distinction does not depend so much upon the nature of the material as upon the mode of working.[2] Attention must be paid entirely to the mode in which the article is obtained, and not to its chemical or geological character.[3] Thus, it is said that those workings which contain gold, silver, copper, lead, iron, tin or other metallic substance in beds or veins are considered as mines and are consequently subject to the regime of mines, properly so called, or mines grantable. As said by De Fooz, this disposition is not restricted, it is only enunciative; "the more the nomenclature is extended," said the committee of the legislative corps, "the more would one think himself authorized to pretend that a mine which is not included does not come within the disposition of the law."[4]

§ 142. Distinction between opened and unopened mines. While the full consideration of this question is postponed to a further part of this work,[5] there are some matters relating to mere definitions that are more appropriate for present consideration. It is sometimes held to be inaccurate to say that a mine is unopened. But in one sense of the word, and as it ought to be viewed under the later definitions, considering the mine as the mode of obtaining the substance and not the substance itself, and which, under the old rule, regarded that as no mine if there was no opening, this would not be true.[6] Our use of the expression is the later one, and as said by Mr. Bainbridge, "the word 'mine' will often be taken

[1] Bainb. Mines, 2; Enc. Met., tit. Quarry; De Fooz, Mines, ch. 6, p. 51.

[2] Bainb. Mines, 3; Rex v. Sedgley, 2 B. & Ad. 65; Rex v. Dunsford, 4 N. & M. 349. See also Shaw v. Wallace, 1 Dutch. (25 N. J. L.) 455, 14 M. R. 420.

[3] Rex v. Brettell, 3 B. & Ad. 424; Shaw v. Wallace, *supra*.

[4] De Fooz, Mines, p. 77.

[5] *Post*, Part XII, chs. II, III and IV.

[6] Astray v. Ballard, 2 Mod. 193; Coke, Litt. 54b.

as synonymous with the mineral substances."[1] Generally it is said the term "mine," when applied to coal, is equivalent to a worked vein,[2] and under the Illinois statute, providing for the health and safety of miners, that has been held to be a mine which is prepared for working, though the miners have not actually begun to take out coal, and it was held that it is not necessary that it should be "opened and worked mines."[3] So it was said by the supreme court of the United States: "The use of the words 'mines or mining claims' (speaking of a Nevada statute authorizing the taxing of the product of mines and mining claims) is evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is well known in the mining districts, and what is, as we have said, recognized by the act of congress as a mining claim."[4] But where the question is one as to the rights of a life tenant and his right to the mines as between him and the remainderman, or where, as between lessor and lessee, the right to mine is demised, the term "mine" is generally restricted to open or exposed mines.[5]

§ 143. Minerals defined — Mineral lands. — The importance of arriving at a correct understanding of what is understood by the term "minerals, or mineral lands," cannot be overestimated. This matter will be best understood when it is remembered that it is of peculiar signification and application in conveyances and leases, which in practical operation result in a severance of the mineral strata from other

[1] Bainb. Mines (1st Amer. and 3d London ed.), p. 3.

[2] Westmoreland Coal Co.'s Appeal, 35 Pa. St. 344, 10 M. R. 394.

[3] Coal Run Coal Co. v. Jones, 127 Ill. 379, 8 N. E. Rep. 865.

[4] Forbes v. Gracey, 94 U. S. 762.

[5] Shaw v. Wallace, 25 N. J. L. 455, 14 M. R. 420; Pierce v. Tidwell, 81 Ala. 291, 2 So. Rep. 15; Westmoreland Co.'s Appeal, *supra;* Vice-Chancellor Kindersley in Darvill v. Roper, 3 Drew. 294; Barnes v. Mawson, 1 M. & S. 85; Tyrwhitt v. Wynne, 2 Barn. & Ad. 554.

portions of the freehold, or one mineral stratum from another. It is also of controlling importance in construing the same kind of instruments where minerals are reserved in a grant of land, or in granting the minerals separate from the rest of the land, which is only to enlarge upon the statement made above. There is another part of the mining law where an accurate knowledge of what is meant by the term "mineral and mineral lands" is of controlling importance namely, as it regards those lands which are open to location as mineral lands in the public-land states and territories of the United States.[1] The term "minerals," standing alone, and as understood in mining law, generally comprehends and includes all the substances in the earth's crust which are sought for and removed by man for the substance itself.

In the early decisions in England there seems to have been a disposition to use in grants and reservations of the right to mine minerals, the comprehensive and general expression, "all mines and minerals." As was said by Baron Parke in a leading case: "The term 'minerals' here used, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines; and Dr. Johnson says that 'all metals are minerals, but all minerals are not metals;' and mines, according to Jacob's Law Dictionary, are 'quarries or places where anything is digged;' and in the year book 17 Edw. III., chapter 7, '*Mineræ d'Pierre*' and '*De Charbon*' are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, and so we think they must be held to be in the clause in question."[2] This definition has been practically followed in England in a great number of cases.[3]

[1] See the next chapter.

[2] Earl of Rosse v. Wainman, 14 M. & W. 859, 15 L. J. Ex. 97, 10 M. R. 398.

[3] Midland Ry. Co. v. Checkley, L. R. 4 Eq. 19; Bell v. Wilson, 1 L. R. Ch. App. 303; Micklethwait v. Winter, 22 L. J. Ex. 313, 5 Eng. Law & Eq. 526; Darvill v. Roper, 3 Drew. 294; Johnston v. Crompton, 68 L. J. Ch. 559.

The particular substances that are locatable as minerals in the public mineral lands will be postponed to a further part of this work, when dealing with each subject particularly.[1] There has been matter of doubt in many of the petroleum states, notably Pennsylvania, as to whether petroleum was included within the general term "mineral," but it may be now considered as settled by the greater number of decisions, as well as the better quality of reasoning, that both petroleum and natural gas are included in the general term "mineral."[2]

In the land department of the United States, this matter has received extensive attention by a great number of attorneys representing the land department, and a diversity of reasoning has been the result; but it may be now said that the better reasoned opinions declare, in general terms, "that whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the purview of the mining act of May 10, 1872."[3]

Following the general policy of the department, which has been to make a distinction between mineral lands and non-mineral lands, according as the evidence showed them to be more valuable for mineral on the one hand, or agriculture on the other, the secretary of the interior, in a recent opinion to the commissioner, uses these words: "If the purpose had been to except from the grant only lands valuable for metalliferous mineral, there would have been no necessity for said proviso as to coal; and if the exception

[1] See *post*, Part VI, chs. I, II, III and IV.

[2] Murray v. Allard, 100 Tenn. 100, 43 S. W. Rep. 355; Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222; Caldwell v. Fulton, 31 Pa. St. 475; Gill v. Weston, 110 Pa. St. 318; Thompson v. Noble, 8 Pittsb. 201; and see *post*, § 818.

[3] Com'r Drummond, Circular Gen. Land Office, July 15, 1873; Copp, Min. Lands, p. 50; Pacific Coast Marble Co. v. N. P. R. Co., 25 L. D. 238. See also Copp's Min. Dec., p. 214.

of mineral land would have included coal, as must be admitted, there is no apparent reason why the exception may not include any other fossiliferous mineral substance, if the lands containing it are chiefly valuable on that account. The contention that this would make the exception coextensive with the grant is fully answered by the condition that in all cases the lands must be *valuable* for their minerals, which, under a long line of decisions, has been held to mean chiefly valuable for minerals, or, which is the same thing, more valuable on that account than for agricultural purposes."[1] It would seem, then, that the true test is whether the lands are more valuable for mineral than for agricultural purposes. There are some decisions the other way, but in view of the above they cannot be considered as controlling.

The supreme court of the United States, however, in following a well recognized policy of withholding salt springs from sale, has held that salt is not a mineral, within the purview of the mineral statutes;[2] but Texas has held the other way in a very well reasoned opinion,[3] and unquestionably, leaving special circumstances out of consideration, it must be construed as mineral.

In the railroad grants, congress expressly excepted all minerals and mineral lands except coal, but it has never been contended for that reason that coal is not a mineral.[4]

§ 144. Land office decisions — Special enumeration of minerals.— While it will involve a repetition, to some extent, it is deemed wise and useful to the practitioner to insert in this place a special enumeration of those minerals and mineral substances which have been recognized as such

[1] Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 L. D. 233. See also Maxwell v. Brierly, 10 C. L. O. 50.

[2] Morton v. Nebraska, 21 Wall. 660. See also Re Salt Bluff Placer, 7 L. D. 549; Hall v. Litchfield, Copp's Min. Lands, 333. By a recent act of congress saline lands are expressly classed as mineral lands and locatable as placer. Act of January 31, 1901 (31 Stat. at L. 745).

[3] State v. Parker, 61 Tex. 265.

[4] See *post*, Part IV, ch. V.

by the land department of the government. The department has, through circulars sent out from the general land office, and by decisions of the general land office made or adopted by the commissioner of the general land office and the secretary of the interior, held the following substances to be minerals, and locatable as such: Asphaltum, albertite and gilsonite, alum, alkaline earths and amygdaloid bands (more especially of agate pebbles that are held in the igneous paste which forms the structural conglomerate (Le Conte, 215), agate, auriferous cement or clay, borax, carbonate of soda, nitrate of soda, sulphur, diamond, fahlbands, clay, fire-clay and auriferous clay, gas, garnet, graphite, granite, gypsum, plumbago and black lead, limestone, lithographic stone, marble, mica, opal, paint rock, petroleum phosphates, potash, slate, soda, stockwercke, stone, sulphur, tin, turquoise, umber and wax.[1]

One ill-considered decision of the land department, which gives no reason for the decision except the fact that clays are plentifully distributed over the earth's crust, decides that aluminum is not a mineral in the sense that it is locatable as such.[2] The decision, however, ignores all previous decisions of the department, and is wholly unsatisfactory in itself; moreover, it is practically overruled although not mentioned by a later case,[3] which follows the broad principle which has uniformly guided the best considered decisions of the department. But the supreme court of Washington has ruled that limestone is not a mineral,[4] disapproving a

[1] Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 L. D. 233; Sec'y Teller to Com'r McFarland, 1 L. D. 561: W. H. Hooper, 1 L. D. 560; Van Doren v. Plasted, 16 L. D. 508; Dobbs Placer, 1 L. D. 565; Pagosa Springs (mineral springs), 1 L. D. 562; Gary v. Todd, 18 L. D. 58; Downey v. Rogers, 2 L. D. 707-709; Piru Oil Co., 16 L. D. 117; Florida Cent. & P. R. Co., 26 L. D. 600; Hayden v. Jamison, 26 L. D. 373; Phifer v. Heaton, 27 L. D. 57; Richter v. State of Utah, 27 L. D. 95.

[2] Jordan v. Idaho Aluminum M. & M. Co., 20 L. D. 500; Alldrit v. Same, id. 349; Re Union Oil Co., id. 351.

[3] Pacific Coast Marble Co. v. Northern Pac. R. Co., *supra*.

[4] Wheeler v. Smith, 5 Wash. St. 404, 32 Pac. Rep. 784.

decision of the supreme court of Montana,[1] which ruled the other way. It may be fairly assumed, however, that the Washington decision is contrary to the great weight of authority and the legislative department of the government, which, as if to place its seal of disapproval upon such a narrow interpretation of the law, as also that placed upon the law by the department,[2] passed the act commonly known as the Building Stone Act, whereby lands chiefly valuable for building stone might be entered as placer lands,[3] and as if to more definitely settle the legislative policy in this respect, it passed the act of February 26, 1895, providing for the examination and classification of certain mineral lands within the states of Montana and Idaho, by section 3 of which it was provided: "That all said lands shall be classified as mineral, which, by reason of valuable mineral deposits, are open to exploration, occupation and purchase under the provisions of the United States mining laws; and the commissioners, in making the classification hereinafter provided for, shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its formation, location or character."[4]

§ 145. Petroleum lands specially recognized.— We adverted in a previous section[5] to the doubt which had been expressed in one state as to whether petroleum should be classed as a mineral in a deed either reserving or granting the mines and minerals alone as such, and we noticed that the weight of authority was in favor of holding that petroleum and natural gas are minerals. The department had

[1] Freezer v. Sweeney, 8 Mont. 508, 21 Pac. Rep. 20.

[2] Conlin v. Kelley, 12 L. D. 1.

[3] Act of August 4, 1892 (27 Stat. at L. 348); 2 Supp. R. S. U. S., p. 65.

[4] Act of February 26, 1895 (28 Stat. at L. 668); 2 Supp. R. S. U. S., p. 885.

[5] See *ante*, § 143.

this matter under consideration, and in a well-considered opinion[1] reviewed and upheld a former decision of the department, in the course of which the following words were used: "The decision, which was in favor of the mineral claimant, was nevertheless an adjudication to the effect that oil lands are mineral lands subject to location and entry under the mining laws, if the requisite conditions as to value are shown to exist; otherwise the mineral locations could not have been sustained as against the homestead entry subsequently allowed. The principle, though not discussed, was necessarily involved, and the decision sustaining the mineral locations and entry is therefore not without weight." In approval of the policy enunciated in the above decision, congress enacted a law of which the following is an extract: "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mining claims: *Provided*, that lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage thereof."[2]

[1] Union Oil Co., on review, 25 L. D. 351. See also Re Piru Oil Co., 16 L. D. 117; Roberts v. Jepson, 4 L. D. 60; Gird v. Cal. Oil Co., 60 Fed. Rep. 531.

[2] Act authorizing the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States, approved Feb. 11, 1897, 29 Stat. at L. 526, 2 Supp. R. S. U. S. 549, to which is appended the following note: "It is explained in House Report No. 2655, 54th Cong., 2d Sess., that under decisions of the interior department, there cited, public lands containing petroleum, with other mineral oils, were held subject to entry and patent under the placer-mining laws. R. S. 2329. By a later decision the previous executive rule was reversed, rendering new legislation necessary to authorize the entry and patent of petroleum lands, as formerly."

§ 146. Same — Petroleum and natural gas mineral and part of the soil.— It may thus be safely said to be settled that, so far as public lands are concerned, petroleum must be classed as a mineral, as must natural gas and all other forms of natural carbon or hydro-carbons. Nor is the rule different when we come to deal with the question as a subject of contract or grant in a deed, whether such act be by the voluntary act of a party, as a deed, lease, will, or the like, or whether it be the involuntary act through a public officer, as a judicial sale by a sheriff or administrator. In either case mineral oils or gas *in situ* must be held to be a part of the soil, owned, in the absence of severance, by the owner of the surface. They are as much so as are timber, coal or iron ore, or any other ores or minerals.[1] It was contended in the principal case mentioned in the note, that because of its fugitive nature, such is not the law, and that it belongs to him who first appropriates it. The decision, however, which is manifestly correct, was against this contention, though of course it only applies where the minerals are taken lawfully, without trespassing, and by proper observance of all safeguards, including provision for the protection strip, of which we shall speak later.

§ 147. Salt springs, lakes, ponds and saline lands.— We have already seen that the early policy of the government was to specially reserve from sale, and from the operation of all grants, all salt licks, salt springs and saline lands. Salt deposits, while not specially included, would probably be considered to be within the spirit of the law. The policy of this law was evidently that of preventing a

[1] Williamson v. Jones, 39 W. Va. 231, 19 S. E. Rep. 436. See also Funk v. Haldeman, 53 Pa. St. 229; Kier v. Peterson, 41 Pa. St. 351; Hake v. Reed, 15 B. Mon. (Ky.) 479; Petroleum Co. v. West Virginia Transp. Co., 28 W. Va. 210; Stoughton's Appeal, 88 Pa. St. 198; Westmoreland & C. Nat. Gas Co. v. De Witt, 130 Pa. St. 235; Duke v. Hague, 107 Pa. St. 57; Hague v. Wheeler, 157 Pa. St. 324; Ontario Nat. Gas Co. v. Besfield, 18 Ont. App. 626; State v. Indiana and Ohio Oil, Gas & M. Co., 120 Ind. 575; People's Gas Co. v. Tyner, 131 Ind. 277.

monopoly of those things, and especially this one thing, so necessary to common use. But the discovery of immense bodies of salt deposit in many forms, as well as of salt lakes, taken in connection with the improved methods of extracting salt from the ocean water, abrogated the necessity of a further observance of this policy. The land department, however, was hampered by the positive law of congress, and repeatedly refused to permit locations upon any saline lands under the placer law as valuable deposits. Happily, however, the old condition has been partially abrogated by the act of congress found in full in the Appendix.[1] This, like many other primary enactments, is incomplete in that, by the proviso, the right of location and patent is restricted to one claim of twenty acres for each person. There is absolutely no reason for this provision, because experience has demonstrated that any attempt to restrict monopoly in this manner falls far short of the mark, if it is not absolutely futile. We have elsewhere noticed[2] that gravel deposits beneath unnavigable waters are locatable as placer. It would seem to follow that the ground and deposits around and beneath salt ponds or lakes, including the lakes themselves, are likewise locatable.

§ 148. Review of the chapter.—It will appear from the foregoing that the term "mining" includes all manner of digging and removing the mineral substances composing the earth's crust, where the object is to obtain the substance itself, except, possibly, gravel for macadamizing streets.

That the term "mine" includes not only the excavation, shaft, tunnel, drift, adit, or other opening made for the purpose of removing the mineral bodies contained in the earth's crust, but also the substance itself so removed when in place. After it is moved, of course, it is personal property, and becomes a chattel under the name of ore, stone, or the like; also that the term "mine" includes the body or mass of

[1] Appendix "A," IV, C.; Act Jan. 31, 1901 (31 Stat. at L. 145).

[2] *Post*, § 310.

mineral land, not only the vein substance, but the entire group of mining claims operated as a mine.

That, in a general sense, all the substances sought for and removed for their intrinsic value, by the operations of mining, may be classed as mineral, and especially that all substances recognized as mineral by the standard authorities, and found in sufficient quantities to make the land more valuable therefor than for agricultural purposes, should be so classed.

That the matter is set forever at rest, so far as the government and the department are concerned, that petroleum and natural gas, which, of course, include all hydro-carbons, are minerals and locatable as such; that, independent of the precious metals, the department has especially ruled in respect to certain enumerated minerals. The ruling of the department, as we shall see further on in this work,[1] is controlling upon matters committed to its charge. And where the duty devolving upon the department is executive merely, the supreme court will adopt and follow it.[2] It is also entitled to consideration in its contemporaneous construction of statutes.[3] But by this it is not meant that the rulings of the department, except upon matters of fact, are absolutely controlling. The supreme court may, and often does, overrule them, and, of course, is the final arbiter in respect of all matters properly coming before the courts.[4]

[1] *Post*, Part IX, chs. I, II, III.

[2] United States v. Moore, 95 U. S. 760.

[3] Brown v. United States, 113 U. S. 568.

[4] Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 L. D. 233; Union Oil Co., id. 351; Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55.

CHAPTER II.

PUBLIC MINERAL LANDS OF THE UNITED STATES, IN WHAT STATES SITUATED.

§ 151. Introductory — Observations of a general nature.
152. Historical observations — Territory of the United States, how and when acquired — What classed as mineral land.
153. States excepted from the operation of mineral lands acts.
154. Only unoccupied, unclaimed public mineral lands locatable as a mining claim — Occupied land or Indian reservations not open.
155. What sort of occupancy will exclude the mineral locator — Distinctions — Mineral lands and land valuable for mineral.
156. Same subject — Reservation by a previous locator — Overlapping locations valid.
157. Character of land — How determined — Return of surveyor.
158. Conclusiveness of department decisions upon itself and upon the courts.
159. More valuable for mineral than agriculture — Distinction.
160. Summary.

§ 151. Introductory — Observations of a general nature.—Not all the public lands of the United States containing minerals are open to exploration, location and purchase as such. Some states have been excepted from the operation of the mining statutes by special provisions of law. We have already ascertained, in a general way, what substances are classed as minerals. Of course it follows that the lands wherein those minerals are found are mineral lands. Whence the further deduction that when those mineral lands are in one of the states or territories to which the mining statutes apply — that is to say, the public mineral-land states of the Union,— they are open to exploration, location and purchase in some one of the ways pointed out and authorized by the statutes of the United States. It is the purpose of this chapter to designate those states and to point out the states which have been excepted from the

operation of the mining laws of the United States. The first provision of the statute is the older one, whereby all lands valuable for minerals are reserved from sale, except as otherwise provided by law;[1] and the other provisions of the mining law[2] are provisions meeting this exception. At the threshold of this exception congress provided that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are open to exploration and purchase, and the lands in which they are found to occupation and purchase in the manner therein provided.[3]

§ 152. Historical observations — Territory of the United States, how and when acquired — What classed as mineral land.— Within the first thirteen states, of course, and within any state carved out of territory belonging to any one or more of them, it is common knowledge and history that the general government never owned any land except that ceded to it for arsenals, dockyards, or some special purposes, which did not transform any of it into public land of the United States. Likewise, within the state of Texas, which came into the Union on her own application, owning and reserving to herself all her public state lands, the United States owns no public lands, and therefore the federal laws do not apply there.

The public mineral lands, therefore, are included solely within the five acquisitions of territory made by the United States, namely:

(*a*) The Louisiana purchase in 1803, by which a portion of the states of Alabama and Mississippi, all of the states of Louisiana, Missouri, Arkansas, Iowa and Nebraska, nearly all of Kansas, all of Colorado east of the Rocky Mountains and north of the Arkansas river, all of Oregon, Washington, Idaho, Montana, North and South Dakota and Wyoming, were acquired;

[1] Act of July 4, 1866, § 5 (14 Stat. at L., p. 86); R. S. U. S., § 2318.

[2] Act of May 10, 1872 (17 Stat. at L., p. 91); R. S. U. S., § 2319 *et seq.*

[3] Ibid.

(b) That acquired by the treaty with Spain, dated February 22, 1819, by which Florida and a portion of Alabama and Mississippi, known as East and West Florida, and described as all of the Spanish possessions east of the Mississippi river;

(c) That acquired by the treaty of Guadalupe-Hidalgo of date February 2, 1848, by which portions of New Mexico and Arizona, all of California, Nevada, Utah, and a portion of Colorado, were ceded to the United States;

(d) That acquired by the Gadsden purchase, December 30, 1853, and comprising about forty-five thousand square miles, and now composing portions of the territories of New Mexico and Arizona;

(e) The district of Alaska, acquired by purchase and treaty from Russia, March 30, 1867, and ratified by the senate June 20, 1867.

§ 153. States excepted from the operation of mineral lands acts.— There are many of the states which are nominally public-land states, but in which the lands are not open to location as mineral land because they have been reserved, either by general policy of reservation expressed and recognized throughout, or by special statutes, in which by name congress has declared that the public lands are to be acquired only as agricultural lands whatever their character. Thus, by an act approved June 21, 1866,[1] congress expressly excepted mineral lands from the operation of general land laws applicable to the states of Alabama, Arkansas, Florida, Louisiana and Mississippi, and when the revision of the statutes of the United States was made in 1875 it was expressly provided that the public lands in the above states could be acquired only by homesteaders.[2]

We have already seen in the earlier sections of this work that the policy of reservation was spread over that portion of the public lands embraced in what was known and called the

[1] Act for the disposal of public lands, etc., approved June 21, 1866 (14 Stat. at L., p. 666). R. S. U. S., § 2303.

[2] R. S. U. S., § 2303.

Indian or Northwestern Territory, and which included the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa and Nebraska, and possibly Missouri; but precious metals were not found in any of those states in any appreciable quantities, and to fully accomplish the reservation of mineral lands from acquisition in any other manner than as agricultural lands within the states of Michigan, Wisconsin and Minnesota, congress, in 1873, made express provision excepting those states from the operation of the mineral laws.[1] Later, by express enactment, the states of Missouri and Kansas were excepted from the operation of the mining laws.[2] By express provision, too, congress has declared that whatever the character of the land in the state of Alabama, the title should be acquired and the lands should be entered only as agricultural lands.[3]

Express provisions do not seem to have been made with reference to the states of Iowa and Nebraska other than the statutes earlier than the mineral laws, except those early reservations which marked the policy of the government prior thereto, and which have been already adverted to. As early as 1875, however, the supreme court of the United States, in an action brought to determine the validity of a title based upon a soldier's bounty land warrant, located upon land in the possession of the state under claim of title, the location having been made of said scrip in 1859, after reviewing the policy of the government to reserve salt licks and mineral lands as expressed in all the acts of congress, denied the right of the applicant to patent such lands with said scrip.[4] True, the law of 1872 was not involved, but it is believed that the enabling acts of both Iowa and Nebraska, in addition to the policy of reservation theretofore expressed with reference to them, show the intention of congress to exclude them from the operation of the mineral-

[1] Act of Feb. 18, 1873 (17 Stat. at L. 465), R. S. U. S., § 2345.

[2] Act of May 5, 1876 (19 Stat. at L., p. 52), 1 Supp. R. S. U. S., p. 104.

[3] Act of March 3, 1883 (22 Stat. at L. 487), 1 Supp., p. 494.

[4] Morton v. Nebraska, 88 U. S. 660.

land laws. Oklahoma has been excepted by express enactment.[1]

All other public lands, therefore, are by the terms of the statute open to exploration, and the mineral lands within them to occupation and purchase as such, and this includes the states of California, Oregon, Washington, Idaho, Montana, North and South Dakota, Colorado, Wyoming, Utah and Nevada, the territories of Arizona and New Mexico, and the district of Alaska, the latter by express provision of statute.[2]

§ 154. Only unoccupied, unclaimed public mineral lands locatable as a mining claim — Occupied land or Indian reservations not open.— Having ascertained in a general way what constitutes minerals within the purview of the law, and having reviewed and enumerated the states which come within the definition of public mineral-land states and territories, it becomes necessary at this time to somewhat enlarge upon the proposition in the concrete; namely, what is meant by public mineral lands of the United States, and what lands are locatable as such? It may be stated as a settled proposition that only unoccupied and unappropriated mineral lands of the United States are open to exploration and location under the laws;[3] but ground does not cease to be unoccupied, within the meaning of the laws of congress, where possession is simply taken by a person who does not proceed to comply with the requirements of the laws relating to the location of a mining claim.[4] Whence it follows that the converse of this proposition must be equally true, and consequently lands upon which there is

[1] Act of March 3, 1891 (26 Stat. at L. 1026), 1 Supp. R. S. U. S. 928, 929.

[2] Act of May 17, 1884 (23 Stat. at L., p. 24), 1 Supp. R. S. U. S. 430–433.

[3] Armstrong v. Lower, 6 Colo. 393.

[4] Belk v. Meagher, 104 U. S. 284; Sparks v. Pierce, 115 U. S. 408; Harris v. Equator M. & S. Co., 8 Fed. Rep. 865; Chapman v. Toy Long, 4 Sawy. 28; McKinstry v. Clark, 4 Mont. 370, 1 Pac. Rep. 759; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. Rep. 280; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. Rep. 158; McCornick v. Varnes, 2 Utah, 55; s. c., 104 U. S. 288.

a subsisting Indian reservation, or which have been otherwise disposed of by the government, being occupied or disposed of at least for the time being, are not open to location — that is to say, lands lawfully reserved;[1] but this rule does not apply to a railroad grant of odd-numbered sections where minerals are reserved expressly from the grant[2] — that is to say, and the rule is, as we shall see when we come to discuss the subject of reservations, that the reservation to be valid must be authorized by the law under which it is made, otherwise it does not exclude the mineral locator.[3]

§ 155. What sort of occupancy will exclude the mineral locator — Distinctions — Mineral lands and land valuable for mineral. — In considering the question whether the land sought to be located as mineral land is vacant, unoccupied and unappropriated, it is necessary to take into consideration the nature and extent of its attempted or claimed occupancy. A mere squatter on the public domain, not claiming the land under any of the laws of the United States, would not be an occupant or appropriator in any sense of the term, so as to exclude such land from location and appropriation;[4] but one in possession, of course, is presumed to be rightfully so until the contrary appears, which will be discussed in a later portion of this work.[5] There is also a well recognized distinction between the acts essential to indicate possession and occupancy of agricultural lands and those necessary in case of mining lands; mining lands must be occupied and claimed as such or not at all.[6] Although in some cases possession by occupancy alone has

[1] See *post*, Part IV.

[2] Barden v. Northern Pacific R. Co., 154 U. S. 288.

[3] United States v. San Pedro & Cañon Del Agua Co., 17 Pac. Rep. 337. See *post*, Part IV, ch. II.

[4] Doran v. Central Pac. R. Co., 24 Cal. 245, 256; Belk v. Meagher, 8 Mont. 65, 1 M. R. 522; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. Rep. 197; Garthe v. Hart, 73 Cal. 541, 15 Pac. Rep. 93; Patchen v. Keely, 19 Nev. 404, 14 Pac. Rep. 847; Funk v. Sterrett, 59 Cal. 614.

[5] *Post*, Part IV, ch. IX; Ricard v. Williams, 7 Wheat. 107; Lebanon M. Co. v. Con. Rep. M. Co., 6 Colo. 381; Patchen v. Keely, *supra*.

[6] English v. Johnson, 17 Cal. 115; Hess v. Winder, 30 Cal. 349; Duprat v. James, 65 Cal. 555, 4 Pac. Rep. 562; Eilers v. Boatman, 8 Utah, 159;

been recognized, yet in such cases the circumstances have been peculiar, and they may be regarded as having been decided upon their own peculiar surroundings, rather than as enunciating any controlling principle of the law; and in such cases the holding and *quasi* right of possession is limited to the ground actually held by a *possessio pedis*.[1] If title is asserted under the name of a mining claim, compliance with the law must be shown,[2] and a locator who first complies with the prerequisites of the law will have the better title. In this connection it may be said to be axiomatic that possession of any kind, unless in good faith and with the intention of complying with some of the statutes of the United States, and thus acquiring title to the land, and that, too, within the time allowed by the controlling statutes or rules, will not exclude a *bona fide* locator who enters peaceably for that purpose.[3] The matter in hand was splendidly illustrated by Lewis, Chief Justice, in an early case in Nevada. He said: "When, therefore, courts presume title in the first proprietor, it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired; and in the absence of mining laws, and where the miner's right rests solely upon his possession, . . . the miner then locating a claim would hold only by actual occupancy, and by such work for the development of the claim as would, under all the circumstances, be deemed reasonable. And his right of possession would only be continued by occupancy and use."[4] Of course the foregoing observations apply strictly

Fitzgerald v. Upton, 5 Cal. 308; Lentz v. Victor, 17 Cal. 271; Gibson v. Puchta, 33 Cal. 310.

[1] Field v. Grey, 1 Ariz. 404, 25 Pac. Rep. 793.

[2] Erhardt v. Boaro, 113 U. S. 536; Becker v. Pugh, 9 Colo. 591; Belk v. Meagher, 104 U. S. 284; Sweet v. Webber, 7 Colo. 450; Zollars & Highland Chief Con. M. Co. v. Evans, 2 McCrary, 39, 4 M. R. 407; Crossman v. Pendery, 8 Fed. Rep. 693; Armstrong v. Lower, 6 Colo. 393; Faxon v. Barnard, 4 Fed. Rep. 702.

[3] Crossman v. Pendery, *supra;* Garthe v. Hart, *ante*, p. 128, n. 4; Atwood v. Fricott, 17 Cal. 37; Belk v. Meagher, *supra*.

[4] Mallett v. Uncle Sam M. Co., 1 Nev. 188.

to mineral lands, and in any case of a conflicting possession or claim between an agricultural claimant and mineral claimant the question would be whether the land was more valuable for mineral than for agricultural purposes.[1]

§ 156. Same subject — Reservation by a previous location — Overlapping locations valid. — As to locations of mining claims, the rule that we have adverted to repeatedly and shall be compelled to notice again—first in time stronger in right — applies with full force. Applying this principle to the matter in hand, it must be quite apparent that where the land, even though otherwise public mineral land, is covered by a valid subsisting location, it is not open to exploration and purchase, and therefore no valid discovery or location can be made upon it; *a fortiori* that the settled rule is that a location to be good must be good when made.[2] It is not to be disputed that overlapping locations are made, and may be lawfully made, (*a*) in order to extend the end of the claim over the overlapped claim, and (*b*) in order to lay the boundaries of the claim in such a way as that extra-lateral rights can be asserted and the entire unclaimed surface be thus taken;[3] for it must be remembered that the locator gets not only the vein located, but likewise all other veins, the top or apices of which lie within his surface boundaries extended vertically. Of course, in such case the overlapping portion of the claim is invalid as to the conflict with the pre-existing claim; but if the discovery is made upon unclaimed ground, as hereinafter pointed out,[4] the claim is valid and lawful for

[1] Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 L. D. 233; United States v. Copper Queen Con. Co. (Ariz.), 60 Pac. Rep. 885; Northern Pac. R. Co. v. Soderberg, 99 Fed. Rep. 506; Johnston v. Crompton, 68 L. J. Ch. 539.

[2] Omar v. Soper, 11 Colo. 399, 18 Pac. Rep. 443; Lebanon M. Co. v. Cons. Rep. M. Co., 6 Colo. 371; Belk v. Meagher, 104 U. S. 279; Oscamp v. Crystal River M. Co., 58 Fed. Rep. 293; Soutter v. Maguire, 78 Cal. 543, 21 Pac. Rep. 183; Armstrong v. Lower, 6 Colo. 393; Garthe v. Hart, 73 Cal. 541, 15 Pac. Rep. 93.

[3] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 79, 82.

[4] *Post*, §§ 351, 355, 359.

all the unappropriated ground sought to be taken. No invasion of the surface rights of the other are permitted to be made, nor is a proceeding of this kind to be classed as such. The locator is simply taking that to which no other claim has previously been made, and this he may lawfully do,[1] but beyond this he cannot go.

§ 157. Character of land — How determined — Return of surveyor. — The character of the land is ascertained in the first instance by the return of the surveyor in extending the survey of the public lands within the district; and while the rulings of the department to which this matter is confided for adjudication are by no means harmonious on this point, the better line of reasoning, as well as what would seem to be the true rule in such cases, is to the effect that, generally, the return of the surveyor-general, made upon the return of the surveyor to him, *prima facie* determines the character of the land as being mineral or non-mineral;[2] and in case of dispute between agricultural claimant and mineral claimant as to the character of the land, since its *status* is *prima facie* settled, the burden of proof is upon the party assailing such return to show that it is incorrect or false;[3] and in such case, it would seem that the decisions of state courts, while they may be persuasive, are not controlling upon the department;[4] and the practice has been to open the matter for discussion, and to grant rehearings upon the question where the facts were brought into

[1] Del Monte M. & M. Co. v. Last Chance M. & M. Co., *ante*, p. 130, n. 3. See pages 82, 83.

[2] Winscott v. Northern Pac. R. Co., 17 L. D. 274; Caledonia M. Co. v. Rowen, 2 L. D. 715–717; Dughi v. Harkins, id. 721; Hooper v. Ferguson, id. 712; Cresswell v. Johnson, 8 L. D. 440; Winters v. Bliss, 14 L. D. 59; Roberts v. Jepson, 4 L. D. 60; Dobler v. N. P. Ry. Co., 17 L. D. 103; Townsite of Deadwood, 8 C. L. O. 18.

[3] Caledonia M. Co. v. Rowen, *supra;* Winters v. Bliss, *supra;* Aspen M. Co. v. Williams, 23 L. D. 34; Johns v. Marsh, 15 L. D. 196; Northern Pac. Ry. Co. v. Marshall, 17 L. D. 545.

[4] Overman S. M. Co. v. Maxwell, 10 C. L. O. 101; Barden v. N. P. R'y Co., 19 L. D. 188; In re Orcas Island Lime Mine, Clark *et al.* Digest, 839.

dispute.[1] The courts have said, in consonance with the rulings of the department, that the return of the surveyor has the weight and character of a deposition as to the character of the land,[2] but is *prima facie* merely of its character,[3] and not conclusive.[4]

§ 158. Conclusiveness of department decisions upon itself and upon the court.— One cannot read the decisions of the department without being impressed with the fact that those who make the decisions are no great sticklers for the rule *stare decisis*. For instance, it is said, without much show of reason it must be admitted, that a final decision of the department as to the character of land is only conclusive up to the time covered by the hearing.[5] It must be assumed at least, although the decision does not say so, that this rule applies only to parties who have had no hearing upon the question. As to parties whose rights were adjusted by the decision, we think the rule would be indisputable that it would be *res judicata* as to them. From considerations of public policy, and inasmuch as congress has confided to the land department the adjudication of the character of public lands, and where and under what circumstances they may be disposed of under the law, the uniform policy has grown up and become established that the courts will not interfere with their jurisdiction. Discussing this rule, the supreme court of the United States, following a long line of decisions, thus declares the law: "Whenever, therefore, mines are found in lands belonging to the United

[1] Magalia Gold M. Co. v. Ferguson, 3 L. D. 284. Inquiry as to the character of the land may be made and protests filed for this purpose at any time before issuance of patent. Cosmos Exp. Co. v. Gray Eagle Oil Co., 104 Fed. Rep. 20–43; Olive Land & D. Co. v. Olmstead, 103 Fed. Rep. 568; Hawley v. Diller, 178 U. S. 476; Michigan, etc. Lumber Co. v. Rust, 168 U. S. 589, 42 L. ed. 591; Knight v. United Land Ass'n, 142 U. S. 161, 35 L. ed. 974.

[2] Kirby v. Lewis, 39 Fed. Rep. 75.

[3] Johnson v. Morris, 72 Fed. Rep. 890.

[4] Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104.

[5] Dargin v. Koch, 20 L. D. 384. See also Stinchfield v. Pierce, 19 L. D. 12.

States, whether within or without townsites, they may be claimed and worked, provided existing rights of others from prior occupation are not interfered with. Whether there are rights thus interfered with, which should preclude the location of the miner, and the issue of a patent to him or his successor in interest, is, when not subjected under the law of congress to the local tribunals, a matter properly cognizable by the land department when application is made to it for a patent; and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought, whether it be mineral, for which a patent may issue, or agricultural, for which a patent should be withheld, and also the citizenship of the applicant." [1]

§ 159. More valuable for mineral than agriculture — Distinction.— Enough has already appeared to indicate that the decisions of both the department and the courts in fixing the character of the land as mineral or non-mineral apply this rule as the test: 'whether the land is more valuable for the one purpose than the other, and holding it to be mineral or non-mineral according to the preponderance of the evidence upon this point; and this, we apprehend, is after all the true rule.[2] By one case it has been held that land upon which was a dump of tailings was mineral land.[3] Likewise, under a California statute authorizing a corporation to sell its mining ground, it was held that where

[1] Steel v. St. Louis S. & R. Co. 106 U. S. 447. See also Barden v. Northern Pacific Ry. Co., 154 U. S. 327; Johnson v. Towsley, 13 Wall. 83; United States v. Throckmorton, 98 U. S. 61; French v. Fyan, 93 U. S. 172; Shepley v. Cowen, 91 U. S. 330; Quinby v. Conlan, 104 U. S. 426; St. Louis S. & R. Co. v. Kemp, id. 641; Vance v. Burbank, 101 U. S. 514; Northern Pac. Ry. Co. v. Cannon, 54 Fed. Rep. 252, 4 C. C. A. 303; Hooper v. Ferguson, 2 L. D. 712; Ferry v. Street, 4 Utah, 521; Cosmos Exp. Co. v. Gray Eagle Oil Co., 104 Fed. Rep. 20 and cases at p. 44.

[2] McLaughlin v. Powell, 50 Cal. 64; Alford v. Barnum, 45 Cal. 482; Merrill v. Dixon, 15 Nev. 401; Francour v. Newhouse, 40 Fed. Rep. 618, 43 Fed. Rep. 238; Iron Silver M. Co. v. Mike & Starr M. Co., 143 U. S. 394.

[3] Rogers v. Cooney, 7 Nev. 213.

the corporation deposited "lustral" or "paint stone" on certain of its land for the purpose of pulverizing the same by means of machinery, such land was mining land within the meaning of that statute.[1] These decisions, we believe, are extreme, and the true rule ought to be, that mineral land is that only which contains mineral in its natural state.

§ 160. **Summary.**— To summarize: the land open to location as a quartz mine must be property belonging to the public domain of the United States, and not within one of the reservations for Indian lands or other lawful purposes, and not within the states of Michigan, Wisconsin, Minnesota, Iowa, Indiana, Missouri, Arkansas, Texas, Mississippi, Tennessee, Florida or Louisiana, as these states have been, by various acts of congress, or in other lawful manner, withheld from the operation of this statute. Of course, the United States owns no public domain within any of the original thirteen states, or any states carved out of their territory. The right to mine can be authorized by state or federal authority only in public lands. Where the lands have become the property of an individual, the right of the government over them is gone.[2] When a location has been made the ground covered thereby is not public mineral land, and no one can make another location thereon as long as the first location is subsisting — not even the first locator.[3]

[1] Johnson v. Lustral Co., 127 Cal. 283.

[2] Armstrong v. Lower, 6 Colo. 393.

[3] Golden Terra M. Co. v. Mahler, 4 M. R. 390.

CHAPTER III.

STATE MINERAL LANDS, AND HOW DISPOSED OF.

§ 162. State lands within the public-land states.
163. State legislation authorizing locations on selected lands.
164. State lands within the first thirteen states.
165. Generally mentioned in the deed.

§ 162. State lands within the public-land states.— Enough is shown by the foregoing sections to indicate that, as a general rule, the mineral lands have been excepted from the operation of grants to the states by the general government. This will be further elaborated later on in another part of this work.[1] Whence it follows as a matter of course that neither of those states has any public mineral land to dispose of; and it would also seem to follow that since the minerals are reserved from those grants, any attempt on the part of the state to convey away the minerals, either as such or where the land is known to contain minerals, would be wholly ineffectual.

§ 163. State legislation authorizing locations on selected lands.— There has been some state legislation disclaiming on behalf of the state, and purporting to reconvey to the United States, without any action on its part, any lands selected by the state, and found after approval of the selection, which amounts virtually to a patent, to be more valuable for mineral than for any other purpose.[2] These statutes further authorize location, working under local rules, and in some cases obtaining patent from the United States of mining claims therein, despite the selection by the state. The exact *status* of such locations and the effect of such legislation is somewhat difficult to determine. That

[1] *Post*, §§ 163, 228. [2] See Appendix B, §§ 33, 34.

the state cannot bestow, and the United States, in the absence of congressional legislation authorizing it, cannot receive land in this way, is unquestionable. The Nevada statute, in some respects, is less ambiguous and more capable of enforcement in terms than is the California statute. The former seems to accomplish a severance of the minerals from the other estate, and to authorize the exercise of eminent domain as to any improvements (possibly title as well) held under the state patent.[1] Since the records of the general land office will show that the United States does not own these lands and therefore cannot patent them, or any part of them, to any mineral claimant, it is possible that the apparent intention of the legislature to permit locations of mining claims upon these lands and the acquisition of and ultimate title to them, including all mining rights, the same as if not patented to the United States, will be carried out by the court in some substituted form similar to the doctrine of *cy pres* at the common law. Pursuant to this the mineral claimant will be considered to have a title the equivalent in dignity of a patent from the United States, after he has performed the requisite amount of labor or improvements.

§ 164. State lands within the first thirteen states.— Within the first thirteen states, of course, and within any territory carved out of them, a different rule applies than in any other state of the Union. Especially is this so with reference to lands within the states containing minerals and which are affected in any way by colonial grants. We have already mentioned some of the states which are thus affected.[2] These grants and the limitations contained therein establish, as a general rule, covenants running with the land. The states, of course, have no uniform system of statutes or mode of disposition of their land, and the enumeration of their statutes would serve no useful purpose It is sufficient to say, as a general proposition, that state

[1] Stanley v. Mineral Union, 63 Pac. Rep. 59. [2] See *ante*, § 13.

lands, the same as lands belonging to the United States, can only be disposed of in the manner authorized by the statutes of the state.[1]

§ 165. Generally mentioned in the deed.— Whatever litigation has sprung out of state grants in the various states has generally come through the necessity of construing a grant or reservation in a deed. All such matters will be considered in another part of this work.[2] In some of the public-land states, notably Oregon and Utah, there was no expressed provision reserving the mineral lands in the state grants by the enabling act; that was done by subsequent legislation. In the states of California and Nevada, however, a policy has grown up and become well recognized to the effect that mineral lands are reserved.[3] In the state of Texas, which is controlled entirely by state laws, a different rule obtains than in any of the other states. It is unhampered by the system of colonial grants, or any others except, possibly, occasional Mexican grants. It has a more or less elaborate mining code of its own,[4] providing for the disposition of mineral lands, the price for which is twenty-five dollars per acre. It provides for annual labor on unpatented land, and requires application for patent to be made within twenty-five years. Unlike the federal statute, no extra-lateral rights are allowed. Only metallic mineral lands are open to location in Texas, however, excluding

[1] Moore v. Brown, 189 N. Y. 127, 84 N. E. Rep. 772; 3 Kent's Com. 378.

[2] *Post*, Part XIII.

[3] Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167; Hermosillo v. Hubbell, 89 Cal. 8, 26 Pac. Rep. 611; Heydenfeldt v. Daney G. & S. M. Co., 10 Nev. 290; Com'r Burdett to Reg. and Rec. Shasta, Cal., Nov. 3, 1874; Keystone Cons. M. Co. v. California, Copp's Min. Lands (2d ed.), 101; Williamson to Denver Office, March 30, 1877, Copp's Min. Lands (2d ed.), 341; Keystone Lode v. State of Nevada, 15 L. D. 259; State of Cal. v. Poley, 4 C. L. O. 18; In re Norager, 10 id. 54. See Roberts v. Cooper, 61 U. S. 467, per Daniel, Justice; R. S. U. S., § 2318.

[4] General Laws of Texas, 1895; Sess. Laws 1895, ch. 127, pp. 197 *et seq.*

expressly all forms of non-metallic minerals, stone and precious stones.[1] Gas and oil are mentioned in this statute, and likewise expressly excluded from its operation; and it is probable that the courts of that state will be compelled to rule that the title to all such minerals must be acquired under some statute other than the foregoing.

[1] See Texas Laws in Appendix, § 4.

CHAPTER IV.

OF MINES AND MINERAL LANDS OBTAINABLE ELSEWHERE.

§ 168. Mineral lands in Mexico.
169. Canadian statutory provisions and regulations.

§ 168. Mineral lands in Mexico.— Within the republic of Mexico, at the present time, there are statutory provisions authorizing mining concessions of a very liberal character. A royalty is reserved to the country, and there are elaborate police regulations relative to inspection, etc. In a general way we may state that:

By the *Ley Minera* of Mexico, in force since July 1, 1892, many essential features of the common law are declared in force, and, except as noted below, the old law is substantially preserved. Added to these are provisions authorizing concessions for the purpose of working mines, similar to the Canadian laws. Except as authorized by concessions, gold, platinum, silver, quicksilver, iron (except marsh ores, loose surface ores and ochres worked for coloring matter), lead, copper, tin (except float tin), zinc, antimony, nickel, cobalt, manganese, bismuth, arsenic, precious stones, rock salt and sulphur, may not be mined; and this reservation extends to minerals even in private lands. But explorations may not be carried on in private lands without consent of the owner; and if consent is not voluntarily given, a condemnation proceeding, similar to ordinary arbitration, is authorized under the direction of the court of first instance, and a judgment of the court is entered in accordance with this report. Concessions are liberally granted on payment of the required tax, and compliance with regulations as under the old law.[1]

[1] Mineral Law of the United States of Mexico, approved June 4, 1892, in force in 1899, titles I, II, III, IV and V.

§ 169. Canadian statutory provisions and regulations. Within the provinces of Canada are more or less elaborate statutory provisions and regulations of the governor in council relative to the mode of acquiring a mining concession, lease or license. In many of the provinces mining is a sort of public use, and the crown lands and dominion lands are open to exploration and to concessions. In some of the provinces, notably New Brunswick, private lands may be entered upon payment of damages to be ascertained by the mode provided by statute and by regulation of the governor in council. In the provinces of Manitoba, British Columbia and the district of the Yukon, to be eligible to obtain a concession the person or corporation must have a license, which is called a free miner's certificate. These certificates are good for one year, and are issued on payment of a fee, usually about twenty dollars. These statutes make complete provision for the size of a claim that may be acquired, and are summarized in the foot-note.[1]

[1] *Quebec:* By statute mining concessions are divided into three classes in unsurveyed territories, namely:

First. The first class contains 400 acres — 52 chains in width by 80 chains and 80 links in depth. Act of 1892, 55 & 56 Vict., ch. 20; R. S. Quebec, §§ 1421 to 1582.

Second. The second class contains 200 acres — 26 chains in width by 80 chains and 80 links in depth.

Third. The third class contains 100 acres — 13 chains in width by 80 chains and 80 links in depth.

In surveyed lots the quantity is the same, but they are divided as near as may be into one, two and four lots each. 55 & 56 Vict., ch. 20; Act of June 24, 1892, ¶ 5, § 1436. See also 43 & 44 Vict., ch. 12, § 25, and R. S. Quebec, § 1453.

Ontario: In this province by statute it is provided that in unsurveyed territory the size of a mining location shall be laid out in rectangular form, with lines running due north and south and east and west, and shall contain one of the following dimensions:

First. Eighty chains in length by forty chains in width, containing 320 acres; or

Second. Forty chains square, containing 160 acres.

Third. Forty chains in length by twenty chains in width, containing 80 acres; or

Fourth. Twenty chains square, containing 40 acres. Mines Act, R. S. O., ch. 36 (1897), as amended by 61 Vict., ch. 11, and 62 Vict. (2), ch. 10.

In surveyed lands the limits of

locations are as regulated and defined by order in council, but the area of any such location shall not be so restricted to less than 40 acres.

Manitoba: By the Mines Act the size of a mining location is the same in unsurveyed lands as in Ontario province. Mines Act of March 30, 1897, 60 Vict., ch. 17; Stat. of Manitoba, 1897, 60 Vict., ch. 17, sec. 7, p. 34.

In provincial lands, however, the foregoing applying, of course, to crown lands, a different rule applies, and as to those lands a location may be made by a free miner holding a license, of the following dimensions:

First. For one person, 660 feet along the vein or lode by 330 feet on each side thereof, measuring from the centre of the vein or lode.

Second. Companies of two or more persons who each hold a miner's license may stake out and work as additional feet along a vein or lode, by the above width, in the proportion of 132 additional feet in length for additional miners, not exceeding 1,320 feet in length all together, and may work the claim jointly. Mines Act, 60 Vict., ch. 17, p. 40, sec. 24, Laws 1887.

Dominion lands Yukon: By the same regulations, approved by the order in council, they are made to apply to all the Dominion lands in Manitoba and in the Northwest Territory, including the provisional district of the Yukon, the size of claims so provided for being 1,500 feet in length by 1,500 feet in breadth. Order in Council, March 21, 1898, as above section.

PART IV.

OF RESERVATIONS AND GRANTS — LAND OPEN TO LOCATION MUST BE UNOCCUPIED AND UNAPPROPRIATED PUBLIC MINERAL LAND.

CHAPTER I.

OF UNEXTINGUISHED INDIAN RESERVATIONS.

§ 171. Review and introductory — Land must be unappropriated and unoccupied under claim of title or right.
172. Of the different character of grants — Subdivisions.
173. Indian reservations — *Status* of the Indian.
174. Indian reservation — How created, how abolished.
175. Indian rights recognized.
176. Location upon Indian reservation void.
177. Location on an Indian reservation is tortious, and by it, as a general rule, no rights can be acquired against a valid location made after the extinguishment.
178. Effect of extinguishment of title.
179. Location on Indian reservation gives imperfect right or no right, according to situation; but possession at opening may be continued and location made — Evidence as to work admissible.

§ 171. Review and introductory — Land must be unappropriated and unoccupied under claim of title or right.— From what has preceded it must be clear that the lands open to location and appropriation as mining claims are confined to those which belong to the United States and which are unappropriated to any other use. Whence it follows that land within an unextinguished Indian reservation, a railroad grant or reservation other than those reserving mineral lands, a military reservation, a Mexican grant, or, in short, any lawfully made grant or reservation which has the effect, either by direct provision in the instrument creating it, or

by law, to restrict the land to the particular use and withdraw it from the *status* of public mineral lands, is not open to exploration, location or appropriation for mining purposes. But mineral lands upon railroad reservations withholding mineral lands, upon townsite reservations, nearly all forest park reserves, or reservations in state grants whereby the mineral is excepted from the grant, do not come within the rule above mentioned, and hence are open to location and exploration.[1]

§ 172. Of the different character of grants — Subdivisions.— Not all of the land belonging to the government, even in the public-land states, is open to location as mineral land, even though it be mineral in character. Indeed it is well known that many Indian reservations, heretofore and now existing, have contained and do now contain within their boundaries much valuable mineral land. It is also true that many Mexican grants which are still *sub judice* contain large areas of mineral land. It will be noticed as we proceed that reservations, in their practical operation, are of three general classes:

First. Those which restrict the area or general quantity of mineral lands otherwise open to location by applying them, for the time being at least, to some other use, as in the case of Indian and military reservations.

Second. Those which enlarge the area or general quantity of mineral lands otherwise reserved from location and appropriation and authorize the taking of land in lieu thereof, which, if not mineral land, would go to other proprietors as railroad grants and grants to the states for educational and other purposes, out of which the minerals are expressly excepted.

Third. Another class which reserves the lands within the reservation from all other uses and purposes except a lim-

[1] Barden v. Northern Pac. Ry. Co., 145 U. S. 535, 36 L. ed. 806, and cases there cited.

ited use of the timber for agricultural purposes, in which category are found forest park reservations.

§ 173. Indian reservations — Status of the Indian.— It is not the purpose of this work to deal with the *status* of the Indian, past or present, except so far as is absolutely necessary to adequately arrive at the nature and quality of the rights which may be exercised by or on behalf of the Indian tribes in respect to mineral lands on Indian reservations. A properly created Indian reservation, which means one authorized or made by act of congress, or by valid treaty with an Indian tribe, until the Indian title is extinguished, is not public land of the United States, and hence a mineral location made upon it is void.[1] The right of the Indian to the land contained within the limits of his reservation is now established by law and treaty. It has long been settled and recognized in this country, and it is unnecessary to dwell extensively upon it here.[2]

§ 174. Indian reservations — How created, how abolished.— The mode of creating an Indian reservation has been generally by treaty, whereby its necessity was ascertained and the *locus* of the reservation agreed upon. After these preliminaries are settled the further proceedings, according to well-recognized authority, are as follows:

"The method of making an Indian reservation is by an executive order withdrawing certain lands from sale or entry and setting them apart for the use and occupancy of the Indians, such reservation previously having been selected by officers acting under the direction of the commissioner of Indian affairs or that of the secretary of the in-

[1] Kendall v. San Juan River M. Co., 9 Colo. 349, 12 Pac. Rep. 198; affirmed, s. c., 144 U. S. 658, 36 L. ed. 583; United States v. Carpenter, 111 U. S. 347; Belk v. Meagher, 104 U. S. 279.

[2] Leavenworth, L. & G. Ry. Co. v. United States, 97 U. S. 733; Cherokee Nation v. Georgia, 5 Pet. 1; United States v. Kagama, 118 U. S. 375; Choctaw Nation v. United States, 119 U. S. 1; Johnson v. McIntosh, 8 Wheat. 543; Fletcher v. Peck, 6 Cranch, 87.

terior, and recommended by the secretary of the interior to the president. The executive order is sent to the office of Indian affairs, and a copy thereof is furnished by that office to the general land office, upon receipt of which the reservation is noted upon the land office records, and local land officers are furnished with a copy of the order and are directed to protect the reservation from interference.

"When such reservation is no longer required, and the president is so informed by the secretary of the interior, an executive order is issued restoring the lands to the public domain, and the order being received by the commissioner of Indian affairs, a copy thereof is furnished to the general land office, where it is noted, and information is communicated to the United States land officers, after which the lands are disposed of as other public lands."[1]

Thus it is that their present title, while recognized by law as a right of some kind, is more in the nature of a tenancy at will, or rather an inchoate right to land in severalty at some future time; as it is now settled that the United States has the right to extinguish the Indian title and abolish the reservation and restore the land to the public domain. But the usual method of so doing, proceeding upon principles of natural justice, is by treaty or contract between the chiefs of the tribes and agents of the government, subject to approval by congress.[2]

§ 175. Indian rights recognized.— While the force and effect of many of the earlier decisions have been lessened by act of congress[3] declaring that no Indian nation or tribe should thereafter be recognized as an independent nation, tribe or power with whom the United States might contract by treaty, still the justice of recognizing their claims and rights has controlled many decisions;[4] and it is believed

[1] Donaldson, Public Domain, p. 243.

[2] Id., p. 244; Johnson & Graham's Lessees v. McIntosh, 8 Wheat. 543, 603.

[3] Act of Congress, March 3, 1871 (16 Stat. at L., p. 566); R. S. U. S., § 2079 *et seq.*

[4] Johnson & Graham's Lessees v.

that the same principle of justice will forbid any ruthless invasion of the *quasi*-rights of the Indians. They have a right to the lands they occupy until that right is extinguished.[1] The supreme court of the United States, speaking through the late Mr. Justice Davis, announced the correct policy in respect to Indian lands and Indian rights: "This right of occupancy has been held to be as sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier. With the ultimate fee vested in the United States, coupled with the sole right to buy that right, in case the Indians were willing to sell, they were safe against intrusion, if the government discharged its duty to a dependent people. . . . That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a possible grant, is a proposition which will command universal assent."[2]

§ 176. Location upon Indian reservation void.— The land within Indian reservations, being reserved for all purposes, it must necessarily follow that a location attempted to be made upon any such land is void. This proposition has received but little attention at the hands of the courts, or rather, the courts have been called upon but few times to pass upon it. It is the policy of the government to forbid and prevent the location of mining claims upon Indian reservations, and in an early case in Dakota this policy was rigidly enforced.[3] In another case in the same court it was decided, in effect, that no title to mining ground could be

McIntosh, 8 Wheat. 543–603; Cherokee Nation v. Georgia, 5 Pet. 1; Godfrey v. Beardsley, 2 McLean, 412.

[1] See authorities in last preceding notes; United States v. Cook, 19 Wall. 591; Beecher's Ex'rs v. Wetherby, 95 U. S. 517; Spalding v. Chandler, 160 U. S. 394.

[2] Leavenworth, L. & G. Ry. Co. v. United States, 92 U. S. 733.

[3] Uhlig v. Garrison, 2 Dak. 71, 2 N. W. Rep. 258.

acquired by acts of location or appropriation prior to the extinguishment of the Indian title.[1] In another case both parties had located on an Indian reservation, and of course avoided that issue on the trial. But Judge Moody, in deciding the case, upon this point says: "I have thus far considered this case without reference to the fact that until the ratification of the treaty with the Sioux Indians, February 28, 1877, the district of country in which the property, the subject of this litigation, is situated, was a part of what is known as the Great Sioux Indian Reservation. The effect of the existence of that reservation was a subject of discussion upon the trial, although I do not understand that either party cared particularly to press it upon the attention of the court; for it was manifest that if it was decided to have any bearing upon the case, both parties would alike be affected by it; in any event that the plaintiff could reap no benefit therefrom. . . . All would have been alike trespassers — violators of the law; and no rights could have been acquired, and no title had its inception, until the taking effect of such treaty ceding the reservation."[2]

§ 177. Location on an Indian reservation is tortious, and by it, as a general rule, no rights can be acquired against a valid location made after the extinguishment.— In a case in Colorado, where a location was made on a reservation, and, after the extinguishment of the Indian title, another location was made covering a portion of the same ground, the party making the first location brought an adverse suit; the pleadings were conceded to be true, and on motion judgment went against the plaintiff thereon (the first locator). The court in deciding the case said: "The effect of the treaty was to withdraw the whole of the land within the reservation from private entry or appropriation, and during its existence the government could not have au-

[1] French v. Lancaster, 2 Dak. 346, 47 N. W. Rep. 395. See also McFadden v. Mountain View M. Co., 97 Fed. Rep. 670.

[2] Golden Terra M. Co. v. Mahler, 4 M. R. 390.

thorized the plaintiffs to enter upon the ground in controversy for the purposes of discovering and locating a mining claim. On the contrary, the government stood pledged to prevent its citizens from entering upon the reservation for any such purposes. The right to locate mineral lands of the United States is declared to be a privilege granted by congress. No such grant, including the premises in controversy, existed at the time of the plaintiff's location. It is also held that a location, to be effective, must be good at the time it was made, and that it cannot be good when made if there is an outstanding grant of the exclusive right of possession to another. The possession of the plaintiffs, at the time of their location of the Bear lode, was tortious. Such being the character of their possession, and assuming to locate a claim not only without legal authority, but in violation of law, the attempted location was a nullity. It was just as if it had never been made."[1]

§ 178. Effect of extinguishment of title.— Of course, when the Indian title becomes extinguished by proper executive proclamation it is then open for location, the rule being that it is Indian land so long as the Indians have title to it and no longer[2]— Indian lands meaning nothing more than lands to which Indians have a sort of inchoate or *quasi*-title.[3] So, for example, after the Colville Indian reservation became open for settlement in the state of Washington, the general laws were spread over it, and the necessary effect was to give prospectors, properly qualified, who made discovery of minerals thereon, the right to locate and hold their claims.[4] But the opening of a reservation takes effect only on the date fixed in the proclamation, and a lo-

[1] Kendall v. San Juan River M. Co., 9 Colo. 349, 12 Pac. Rep. 198; affirmed on appeal, s. c., 144 U. S. 658. See also Commissioner to W. C. Potter, August 18, 1891; Commissioner to W. G. Dyke, January 9, 1892; Clark, Heltman and Consaul, Min. Dig., p. 443.

[2] United States v. Four Bottles of Sour Mash Whiskey, 90 Fed. Rep. 720; Bates v. Clark, 95 U. S. 204.

[3] Ex parte Crow Dog, 109 U. S. 556.

[4] United States v. Four Bottles of Sour Mash Whiskey, *supra*.

cation made after the promulgation of the proclamation, but before it takes effect, is void,[1] and, in any case, the character of the land must be established as mineral.[2]

§ 179. Location on Indian reservation gives imperfect or no right, according to situation, but possession at opening may be continued and location made—Evidence as to work admissible.— Where one innocently takes possession of mineral land, makes a discovery, and does all the acts necessary to accomplish a valid location, and remains in actual possession of it, and afterwards finds that it is on an Indian reservation, he may, if he is in possession at the time of the opening of the reservation and extinguishment of the Indian title, remain in possession, adopt his previous acts as of that date, and date his location from that time, and the location will be good notwithstanding the tortious acts on the Indian reservation; this, in the absence of any adverse claim, and conditioned upon absolute innocence and good faith on the part of the locator; the theory being that the tort is waived and the location dates from the extinguishment of the Indian title.[3] It was further held competent to show that the rules of the district embracing the ground, even though improperly embracing it, have been complied with, and the nature and character of the development work done on the claim prior to the opening, not as creating any absolute right to the property, but as showing the existence and condition of the same when their possession became lawful under the new agreement. But the subsequent rights of such locator of course are dependent upon an observance of the law as in all other cases, which the locator may show as entitling him to the land.[4]

[1] McFadden v. Mountain View M. & M. Co., 97 Fed. Rep. 670; Colville Ind. Res., opened by Act of July 1, 1898 (2d Sess. 55th Cong., p. 593), for location mining claims.

[2] Durant v. Corbin, 94 Fed. Rep. 394.

[3] Noonan v. Caledonian G. M. Co., 121 U. S. 393, 30 L. ed. 1061, affirming s. c., 14 N. W. Rep. 426, 8 Dak. 189.

[4] Id.; Caledonia M. Co. v. Noonan, 8 Dak. 189, 14 N. W. Rep. 426.

CHAPTER II.

OF MEXICAN GRANTS, THEIR KINDS, STATUS AND VALIDITY — THEIR EFFECT AS RESERVATIONS.

§ 181. Introductory — General nature and effect of grant.
182. The progression and change in the law.
183. Minerals on Mexican grant reserved by congress — Special act — Opinion by the court.
184. Time for asserting right under Mexican grant — Waiver of right — The old rule under the California act.
185. Summary.

§ 181. Introductory—General nature and effect of grant. The manner in which Mexico has disposed of her mineral lands, and now disposes of them, has been sufficiently demonstrated for the purposes of this work. With the general doctrine of Mexican grants in all its phases, the principles controlling them, and the rights and estates acquired thereby, as well as the different kinds of grants, this work, generally speaking, has nothing to do; but simply in respect of those *sub judice*, that is to say, under claim or in process of adjustment; because it is only in those grants, as a general rule, and which for the time being are reserved, that there can be any hope of mineral lands being restored to the public domain. Within those grants land may be restored to the public domain, either because the grant fails of establishment, or the grant is for a smaller area within a tract of larger given dimensions, or because one or more sides is imperfectly described and not ascertained. It is sufficient, in such cases as those mentioned in the two last circumstances, that enough remains from which the grant may be satisfied.[1] Moreover, it is sufficient for the purpose of this

[1] Newhall v. Sanger, 92 U. S. 761, 187; Van Reynegan v. Bolton, 95 U. S. 33; United States v. McLaughlin, 127 U. S. 428. See also Corn-
11 Opp. Atty. Gen., p. 493; 13 id., p. 888; Frisby v. Whitney, 9 Wall.

work to say, in a general way, that the mode of disposing of agricultural lands, whether for colonization or for ranch purposes, was altogether different from the mode of disposing of mineral lands.[1] So important was this, and it is still important, that if minerals were known at the time of the initiation of the grant, that is to say, at the time it was applied for, and the grant was sought for any other purpose, it would be such fraud and concealment as would defeat the grant.[2]

§ 182. The progression and change in the law.—The last case was decided under the law of congress as it stood at that time, passed in 1854, creating the office of surveyor-general of New Mexico, Kansas and Nebraska, and by the terms of which, while certain grants were made to residents in the territory of New Mexico, mineral lands were expressly reserved;[3] and it was because of this, no doubt, and because the grant itself was for agricultural lands, that the court held that the title to mineral lands did not pass.[4] This, of course, was special under that act; but in California, prior to the passage of the special act of congress, which controlled and was special in that state alone, it was held that the discovery of gold or silver on a Mexican grant did not destroy the title to the surface in the individual holding the grant, and this was confirmed by the supreme court of the United States.[5] This, then, was the condition of the law prior to

wall v. Culver, 16 Cal. 429; Riley v. Heisch, 18 Cal. 198; Mahoney v. Vanwinkle, 21 Cal. 552.

[1] United States v. Castelero, 2 Black, 371; United States v. San Pedro & Canon del Agua Co., 4 N. M. 225, 17 Pac. Rep. 337; affirmed, 146 U. S. 120.

[2] United States v. San Pedro & Canon del Agua Co., *supra*.

[3] Act of July 22, 1854, entitled "An act to establish the offices of surveyor-general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes." 10 Stat. at L. 308.

[4] United States v. San Pedro & Canon del Agua Co., 4 N. M. 225, 17 Pac. Rep. 337, 416, 417.

[5] Fremont v. United States, 17 How. 442; s. c., 15 L. ed. 241; Fremont v. Flower, 17 Cal. 199; Moore v. Smaw, 17 Cal. 199; Fremont v. Seals, 18 Cal. 434; Ah Hee v. Crippen, 19 Cal. 491.

the passage of the special act which applies to the territories of Arizona and New Mexico, and to the states of Colorado (that portion involved in the treaty of Guadalupe-Hidalgo), Nevada, Utah and Wyoming, which we will proceed to examine in the next section.

§ 183. Minerals on Mexican grant reserved by congress — Special act — Opinion by the court.— After the Canon del Agua case, and as if to confirm, by the legislative voice, what the court in that case, by traveling the full length authorized by the principles of equity, accomplished in its opinion, an act was passed creating a special tribunal to adjust those claims within the states and territories mentioned in the last section, and to mark out the law and the rules which were to guide that court in such adjudications. By the thirteenth section, and in the third subdivision thereof, it was provided: "No allowance or confirmation of any claim shall confer any right or title to any gold, silver or quicksilver mines, or minerals of the same, unless the grant claimed affected the donation or sale of such mines or minerals to the grantee, or unless such grantee has become otherwise entitled thereto in law or in equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act. But no such mine shall be worked on any property confirmed under this act without the consent of the owner of such property, until specially authorized thereto by an act of congress hereafter passed."[1]

The supreme court of New Mexico, in reviewing both these acts of congress, in a case where a mining claim had been made upon a claimed Mexican grant, then *sub judice*, uses this language: "It will thus be seen from these acts of

[1] An act to establish a court of private land claims, and to provide for the settlement of private land claims in certain states and territories; approved March 3, 1891 (26 Stat. at L. 854); 1 Supp. R. S. U. S. 917-922.

congress that it has first established a reservation of the lands embraced within the boundaries of a claimed grant upon the report of the surveyor-general, and that thereafter it has elected to repeal the reservation, and the section of the act authorizing it, and to provide for compensating any grant claimant for any lands which the government may have elected to sell and dispose of within the boundaries of his grant. It seems clear to us, therefore, that there is no statutory reservation of any of the lands embraced within the boundaries of a claimed grant in New Mexico. . . . We do not agree to the construction put upon the treaty of Guadalupe-Hidalgo by the land department of the government, nor do we think that construction is borne out by the supreme court of the United States in the cases cited above. Neither any actual reservation of these lands by the land department, nor any statutory authority for making such reservation, has been called to our attention, and we assume that none exist. There being no reservation of these lands within claimed grants in New Mexico by treaty, law, or authorized act of the executive department of the government, we conclude that they are not reserved lands, and are 'lands belonging to the United States' within the meaning of section 2319 of the Revised Statutes of the United States."[1] In this case the land claimed was outside the boundary as adjudicated, and an appeal had been taken and was undetermined.

The court upheld the location of the mineral claimant, and while the reservation was a sweeping one, it would seem that the conclusion of the court is correct in view of the facts of the case and authorities cited by it.[2] Moreover, we must remember that this reservation reserved all miner-

[1] Lockhart v. Wills (N. M. 1898), 54 Pac. Rep. 336, 338, 339. See also Wolsey v. Chapman, 101 U. S. 755.

[2] Newhall v. Sanger, 92 U. S. 761; Van Reynagan v. Bolton, 95 U. S. 33; Hosmer v. Wallace, 97 U. S. 575; Trenouth v. San Francisco, 109 U. S. 251; Aurre Coechea v. Bangs, 114 U. S. 381; Doolan v. Carr, 125 U. S. 618; United States v. McLaughlin, 127 U. S. 428; Carr v. Quigley, 149 U. S. 652.

als to the United States. This certainly had the effect to restore minerals and mineral lands outside the survey to the same position as if no grant or interference therewith had ever been made, with the added reservation of an additional right to be thereafter asserted as to any lands finally falling within the grant.

Now, since it is a well-known rule of statutory construction, so well settled as to become a maxim of the law, that statutes *in pari materia* must be read and construed together, and since the subject of both statutes, that is to say, this special statute and the general mineral statutes of the United States,[1] are upon the same subject, it must necessarily result that they must be read together, and when so read, what is the result? Manifestly the conclusion reached by the court: that these lands outside the adjudication are restored to and made a part of the public mineral domain of the United States, to be disposed of as other mineral lands. As to the lands within the settled grant the minerals are reserved.

It must be confessed that this statute marks a radical departure from the long-established policy of the government. It may be only temporary in its operation, but as it stands it authorizes a reservation which may in some cases turn out to be as large as the grant, and thus defeat it. A further excuse for this policy is found in the notorious fact, knowledge of which is imputable to congress, that many of these claimed grants were initiated in fraud and are therefore spurious. Therefore the claimant takes his chances. The law stares him in the face, and if he shall lose his grant he is no worse off than under the Mexican government, where the minerals were reserved — the precious metals — no treaty obligations have been violated. Congress, in order to have these claims adjusted on their merits, independent of any supposed mineral value to excite the cupidity of meritless claimants, has simply said: "Hands off until we settle the rights of these supposed grantees." We apprehend no difficulty from this reservation, as the right of ulti-

[1] R. S. U. S., § 2319 *et seq.*

mate disposal is expressly reserved. Besides, as we shall see further on in this work,[1] if this were not so, the result would still be the same, because a reservation carries with it, as settled now by the great weight of authority, all the means necessary for its enjoyment, including the right of entry; and a qualified locator, going upon those lands at the proper time, with the license of the government, in the shape of its laws, supporting him, will *pro hac vice* occupy the position of the government, and therefore have an indisputable right.

§ 184. Time for asserting right under Mexican grant — Waiver of right — The old rule under the California act.— In 1851 congress passed an act providing for the adjustment of claims under Mexican grants in the state of California. This statute fixed a limitation of time within which claims should be made. This requirement was plain and unambiguous; it was notice to all the world, requiring the assertion of any claimed rights to such lands in the tribunal provided by law and within the time allowed by law, and if the right was not so asserted it was waived and the lands then became public lands. As was said by the United States supreme court in a leading case: "A failure, therefore, to present the claim within the required time, or a rejection of it, either by the commission, or by the district court, without seeking to obtain a review of their respective decisions, or by this court, rendered it unnecessary to reserve the claimed lands from settlement and appropriation. They then became public in the just meaning of that term, and were subject to the disposing power of congress."[2]

§ 185. Summary.— A summary of the authorities seems to justify the following conclusions:

That ordinarily, and as a general rule, an undetermined grant, that is, one *sub judice*, has the effect to reserve the land claimed until determined, when any portion restored

[1] See *post*, Part XII, ch. IV. [2] Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769.

to the public domain is open to location the same as though no claim had been made.

To this there seems to be these exceptions:

First. Where the grant is of a given size within larger boundaries, it is open, if enough remains from which to make the selection.

Second. Where claimants neglect for the time prescribed to make their claim.

Third. Where an adjudication has been had, although appealed from, that excluded by the judgment is restored and is open to location.

Confirmed grants are equivalent to patent if land was properly taken, but if fraudulent, as mineral land taken for agriculture or settlement, or for colonization, they are open to attack by the government regardless of change of possession, for the reason that notice of such character is imputed to the confirmee and his grantee, and is a vitiating circumstance running with the land. The lands affected by the act of March 3, 1891, are withdrawn for the time being. But this is a reservation with right of entry reserved, and the confirmees take the land impressed with the burden.

CHAPTER III.

MILITARY RESERVATIONS.

§ 189. Authority for and effect of military reservations.
190. Question elaborately considered by the supreme court of the United States — Authority of the president settled.
191. Manner of opening military reservations — Mining locations upon such reservations.
192. The present rule of the department — Mineral lands may be included in a military reservation, during which time the reservation is absolute.

§ 189. Authority for and effect of military reservations.— Military reservations selected by the president, either under special authority of congress, or *ex officio* as commander-in-chief of the army, are, during the existence of the reservation, and until abandoned and returned to the public domain (either by authority of congress or by order of the president), and all land embraced within any such reservation, is incapable of location as mineral lands, even though such land may contain mineral, and be in fact mineral land. The authority of the president, as commander-in-chief of the army and navy of the United States, to set aside and reserve public lands necessary to the use of the army, to be known as military reservations, has been so long recognized, both by congress and by the courts, that it may now be considered as settled.[1] There are many instances of selections for sites for military purposes under authority of the act of congress above cited, and they were considered as containing ample authority therefor.[2]

[1] The pre-emption act of congress, May 29, 1830, 4 Stat. at L. 421, 5 id. 455, 10 id. 246; Grisar v. McDowal, 6 Wall. 363; s. c., 18 L. ed. 863; Stone v. United States, 2 Wall. 522; Wilcox v. Jackson, 13 Pet. 512; United States v. Railroad Bridge Co., 6 McLean, 527; Case No. 16,114, 27 Fed. Cases, p. 686. See also Wolcott v. Des Moines Navigation & Ry. Co., 5 Wall. 681.

[2] Wilcox v. Jackson, 13 Pet. 512;

§ 190. Question elaborately considered by the supreme court of the United States — Authority of the president settled.— Some dispute has arisen from time to time as to the authority of the president, or of the secretary of war acting under him, to create and establish military reservations, but it may be now said to be settled beyond controversy. In the last case before the supreme court of the United States, that court in discussing the power of the president said: "It only remains to notice the objection taken to the authority of the president to make the reservations in question. The objection is twofold: first, that the lands reserved did not constitute any part of the public domain, but were the property of the city (of San Francisco), and were not, therefore, the subject of appropriation by order of the president for public purposes; and second, if they did constitute a part of the public domain, they could only be reserved from sale and set apart for public purposes under the direct sanction of an act of congress." After considering that the city's title was not good, and on the question of the president's power, the court proceeds to say: "But further than this: From an early period in the history of the government it has been the practice of the president to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the president in this respect is recognized in numerous acts of congress. Thus, in the pre-emption act[1] it is provided that the right of pre-emption contemplated by the act shall not 'extend to any land which is reserved from sale by act of congress, or by order of the president, or which may have been appropriated for any purpose whatever.' Again, in the pre-emption act of September 4, 1841, 'Lands included in any reservation by any treaty, law or proclamation of the president of the United States, or reserved for salines or other purposes,' are exempted from entry under the act.[2] So, by the act of

United States v. Railroad Bridge Co., 6 McLean, 527, Fed. Cas. No. 16,114, 27 Fed. Cas. 686.

[1] Act of May 29, 1830 (4 Stat. at L. 421).

[2] 5 Stat. at L. 455.

March 3, 1853, providing for the survey of the public lands in California, and extending the pre-emption system to them, it is declared that all public lands in that state shall be subject to pre-emption and offered at public sale, with certain specific exceptions, and among others of 'lands appropriated under the authority of this act, or reserved by competent authority.' The provisions of the acts of 1830 and 1841 show very clearly that by competent authority is meant the authority of the president and officers acting under his direction. The action of the president in making the reservations in question was indirectly approved by the legislation of congress in appropriating money for the construction of fortifications and other public works upon them."[1]

§ 191. Manner of opening military reservations — Mining locations upon such reservations.— It is not important, for the purpose of this work, to notice how military reservations are abandoned and restored to the public domain; but, inasmuch as it is closely connected with the matter in hand, it is sufficient to say that it is generally by act of congress authorizing the president to open them by proclamation.[2] If at the time of the reservation there is a valid location upon the land reserved, such location may be kept alive upon compliance with the law, as a vested right, as though no reservation had been made. And if, by reason of the exclusiveness of the reservation, the locator is prevented from performing annual labor, independent of any other right he may have in the premises, he has a superior right at the opening of a reservation.[3]

§ 192. The present rule of the department — Mineral lands may be included in a military reservation, during which time the reservation is absolute.— Mineral lands may be included in reservations for military purposes, and

[1] Grisar v. McDowal, 6 Wall. 363–382; s. c., 18 L. ed. 863, per Justice Field. See also Wolcott v. Des Moines Nav. & R. Co., 5 Wall. 681.

[2] See Act of July 5, 1884 (23 Stat. at L. 103); 1 Supp. R. S. U. S. 453.

[3] Camp Bowie Reservation, 7 C. L. O. 4; Fort Maginnis Case, 1 L. D. 552.

they are not subject to appropriation by mineral claimants while such reservation exists. But where mining claims were legally located and held prior to such reservation, the miner's rights cannot be divested by taking the land for military purposes.[1] On October 21, 1881, the following questions were propounded to Hon. Wayne MacVeagh, attorney-general, by Hon. Robert T. Lincoln, secretary of war (the claim being that several mineral locations had been made upon the Fort Maginnis military reservation, Montana, several months previous to the location of the post by the military authorities):

1. Whether or not mineral lands reserved from sale under section 2318, Revised Statutes of the United States, can be reserved for military purposes by order of the president.

2. Where mineral lands are included within the limits of a military reservation, are such lands open to exploration and purchase under section 2319 of the Revised Statutes.

3. Where an inchoate title to mineral lands has been acquired, as shown in the letter of the secretary of the interior and the accompanying report of the commissioner of the general land office, and such lands have subsequently been included within military reservations, can the title to said mineral lands be perfected by the private owner.

The attorney-general answered the first two questions together and held that the president had power to make the reservation.[2] And when so made, "lands so appropriated become severed from the public domain and are thenceforth not subject to occupation and purchase under the general law." The learned attorney-general, after citing a decision of the supreme court[3] to the effect that the government had recognized the property rights of miners in locating mineral lands, proceeded to say: "It seems to me that where such rights have attached to mineral lands in favor of the locator of a mining claim, the land, during the continuance of the

[1] Copp's Mineral Lands, p. 310.

[2] Cites Grisar v. McDowal, 6 Wall. L. ed. 318.

[3] Forbes v. Gracey, 94 U. S. 762, 24 368.

claim (i. e., so long as it is maintained in accordance with law), becomes, by force of the mining laws, appropriated to a specific purpose, namely, the development and working of the mine located; and unless congress otherwise provides, it cannot, while that right exists, notwithstanding the title thereto remains in the government, be set apart by the executive for public uses. If, then, the possessory right of the miners, in the case under consideration, was full and complete previous to the establishment of the military reservation of Fort Maginnis, I am of opinion that the inclusion of their claim within the limits of the reservation was without authority of law and could not legally divest them of such right, or of the further right (on compliance with the requirements of the statute concerning the issue of patents for mining claims) to acquire title to the land."[1] This seems to be the rule of the department, and so far as it overrules the Camp Bowie case it may be considered as the authoritative declaration of the department.[2]

[1] Fort Maginnis Case, 1 L. D. 552. [2] Lindl. Mines, §§ 185–192.

CHAPTER IV.

FOREST PARK RESERVES.

§ 193. Forest park reserves, how created.
194. All such reservations have the effect to withdraw the land from the category of public lands.

§ 193. Forest park reserves, how created.—The primary authority for the creation of a forest park reservation is an act of congress, by which the executive is authorized, from time to time, in his discretion, to set apart certain portions of the public domain, to be by him ascertained, as forest or national park reservations. This is the general rule. There have been, however, many reservations made by special act of congress, where the metes and bounds are either ascertained in the act or authorized to be ascertained by survey. The first general law on the subject is found in the act of March 3, 1891,[1] by the twenty-fourth section of which the president is authorized, from time to time, to set apart and reserve in any state or territory having public land bearing forests, in any part of the public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and to declare by proclamation the establishment of such reservation and the limits thereof. The national parks so far have all been set apart by acts of congress. This act was supplemented by a subsequent enactment,[2] which provided generally that forest reservations shall only be established for the purpose of protecting the timber or securing favorable conditions of water flow, and lands more valuable for min-

[1] An act to repeal timber culture laws and for other purposes, approved March 3, 1891 (26 Stat. at L., p. 1095); 1 Supp. R. S. U. S. 940-947.

[2] 30 Stat. at L., pp. 34, 35, 36.

eral or agricultural purposes than for timber are not to be included in such reservation. Permission is also extended to citizens to enter upon any such reservations for the purpose of locating, prospecting or developing mining claims; also to take timber for fire-wood, fencing, buildings, and for the use of miners and prospectors. Actual settlers are also permitted to enter upon and cross such reservations, and to establish roadways for that purpose. The secretary of the interior, with the approval of the president, after sixty days' publication in two newspapers of general circulation in the state or territory where the reservation is situated, may restore to the public domain any part of such reservation which has been found by personal inspection to be more valuable for mining or agricultural purposes than for forest usage.[1]

§ 194. All such reservations have the effect to withdraw the land from the category of public lands.— Manifestly, it results from the withdrawal of the public lands from sale, and their establishment as a forest park reserve, that they are no longer, in contemplation of law, public lands of the United States, and in the absence of special law or lawful rule or regulation permitting locations, no valid mineral location can be made upon any such reservation.[2] Congress has, in some instances, authorized mineral entries on park reserves and on forest reserves, and the department of the interior, acting under instructions from the president, under the president's authority to open such reserves, has authorized the same thing. Of course, any such case forms an exception to the rule above stated, and within the bounds of the exception the rule does not apply.[3] There are also

[1] 30 Stat. at L., p. 36.

[2] Emma F. Zumwalt, 20 L. D. 32; Colomackas G. M. Co., 28 L. D. 172; Cotton v. United States, 11 How. 229, 13 L. ed. 675; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Dugan v. United States, 3 Wheat. 172, 4 L. ed. 362; United States v. Gear, 3 How. 120, 11 L. ed. 523.

[3] See Act of February 20, 1896 (29 Stat. at L., p. 11). See also Opinion of Asst. Atty. Gen. Shields, 14 L. D. 209.

reservations, made under special circumstances, where only the timber is reserved from general destruction, and a taking for mining purposes, either on the reservation or to be used in close proximity thereto, is authorized by law, executive rule, or both.[1]

[1] Act of June 8, 1878 (20 Stat. at L. p. 88), 1 Supp. R. S. U. S. 166, applies to Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, the Dakotas, Idaho and Montana. This has also been extended by executive order under the act above referred to. See also as to Colorado, Act of February 20, 1896 (29 Stat. at L. 11), 2 Supp. R. S. U. S. 447.

CHAPTER V.

RAILROAD GRANTS—MINERALS EXCEPTED FROM THE GRANT.

§ 197. Railroad grants and reservations—Their kinds and legal effect.
198. Construction of railroad grants—Illustrations of grants *in præsenti*—Floats.
199. Selection and filing map exhausts the right.
200. Mining rights on the right of way.
201. No valid discovery on right of way—Extra-lateral rights.
202. Railroad grants in which mineral lands were withheld.
203. Policy of the government to reserve minerals.
204. Early definition of mineral lands—"Known minerals."
205. Earlier decisions overruled—Minerals and mineral lands reserved, known or unknown.
206. The cases distinguished—The rule *stare decisis* not departed from.
207. Patent conclusive as to title in the absence of fraud.
208. Lieu lands—Their selection and quality.

§ 197. Railroad grants and reservations—Their kinds and legal effect.—So far as material to this work, the law governing the acquisition of mining claims conflicting with railroad grants involves the consideration of three propositions:

1. The grant itself, primarily of the given number of odd-numbered sections on each side of the line of the road as definitely located.

2. The right of way absolutely, with only the ultimate fee reserved to the government, if abandoned utterly, with an easement in some cases running with the land, reserved to an adjoining proprietor, of the right to penetrate the right of way in following a vein on the dip or downward course.

3. The reservation of the mineral land and the selection of lieu lands, with attendant rights and duties.

As a general rule, railroad grants are construed as grants

in præsenti,[1] and operate for some purposes by relation to the date of the act; while for other purposes, as, for instance, their operation upon lands containing minerals, they are not effective for such purposes until the patent is actually issued.

§ 198. Construction of railroad grants — Illustrations of grants in præsenti — Floats.— We noticed in the last section that railroad grants are construed as grants *in præsenti*. In applying the principle of a grant *in præsenti* to the *locus in quo*, any limitation, reservation or exception is likewise applied at the same time, even though the facts upon which the reservation is based are subsequently developed. Thus, the supreme court of the United States, speaking through Mr. Justice Field, in a leading case forcibly illustrated this doctrine in the following words: "It is also true that the grant was one *in præsenti* of the lands to be afterwards located. From the immense territory from which the sections were to be taken it could not be known where they would fall until the line of the road was established; that the grant attached to them, subject to certain specified exceptions; that is, the sections, or parts of sections, which had been previously granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, were excepted, and the title of its other sections, or parts of

[1] Deseret Salt Co. v. Tarpey, 142 U. S. 247; Barden v. Northern Pac. Ry. Co., 154 U. S. 288; Leavenworth, L. & G. Ry. Co. v. United States, 92 U. S. 741; Smith v. Northern Pac. Ry. Co., 58 Fed. Rep. 513, 7 C. C. A. 397; St. Joe & Denver City Ry. Co. v. Baldwin, 103 U. S. 426; Grinnell v. Railway Co., 103 U. S. 739; Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 329; St. Paul & Pac. Ry. Co. v. Northern Pac. Ry. Co., 139 U. S. 1; Sioux City, etc. Land Co. v. Griffey, 143 U. S. 32; Wisconsin Cent. Ry. Co. v. Price County, 133 U. S. 509; Schulenberg v. Harriman, 88 U. S. 60; Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 496; Wood v. Burlington & M. River Ry. Co., 104 U. S. 329; St. Paul & Sioux City Ry. Co. v. Winona & St. P. Ry. Co., 112 U. S. 720; Bybee v. Oregon, etc. Ry. Co., 139 U. S. 663; Van Wyck v. Knevals, 106 U. S. 360; Wilkinson v. Northern Pac. Ry. Co., 5 Mont. 538; McKee v. Donahue, 76 Cal. 499; Doran v. Central Pac. Ry. Co., 24 Cal. 245.

sections, attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of the mineral lands made at its date or then excluded therefrom by conditions annexed. Whatever the location of the section, and whatever the exceptions then arising, there remained that original exception declared in the creation of the grant. The location of the sections and the exceptions from other causes in no respect affected that one, or limited its operation. There is no language in the act from which an inference to that effect can be drawn, in the face of its declaration that all mineral lands are thereby 'excluded from its operations,' and the joint resolution of . . . congress . . . that 'no act of the thirty-eighth congress . . . granting lands to states or corporations, to aid in the construction of roads, or for other purposes, shall be so construed as to embrace mineral lands.'"[1]

It is well settled that until the filing of the map of definite location all railroad grants are mere floats, and that thereafter they attach to the particular land described in the grant,[2] and the position of the road is thus fixed by the filing of the map of definite location.[3]

§ 199. Selection and filing map exhausts the right.— The circuit court of appeals of the eighth circuit, in a case where this point was directly involved, makes the following clear statement of what seems to us to be the law: "It is also well settled that, so far as the land grant is con-

[1] Barden v. Northern Pac. Ry. Co., 154 U. S. 288-315; 13 Stat. at L. 567.

[2] Barden v. Northern Pac. Ry. Co., 154 U. S. 288; Deseret Salt Co. v. Tarpie, 142 U. S. 241; Smith v. Northern Pac. Ry. Co., 7 C. C. A. 397, 58 Fed. Rep. 513; Wilkinson v. Northern Pac. Ry. Co., 5 Mont. 358; Central Pac. Ry. Co. v. Dyer, 1 Sawy. 641, Fed. Cas. No. 2552; St. Joe & Denver City Ry. Co. v. Baldwin, 103 U. S. 428: Bybee v. Oregon & Cal. Ry. Co., 139 U. S. 663; Western Pac. Ry. Co. v. Tevis, 41 Cal. 489.

[3] Smith v. Northern Pac. Ry. Co., *supra;* Van Wyck v. Knevals, 106 U. S. 360; Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629; Sioux City, etc. Land Co. v. Griffey, 143 U. S. 32.

cerned, the line of the railroad was definitely fixed by filing with, and acceptance by, the secretary of the interior of the company's map of its line of definite location. The company thereby exhausted its right of selection, and so firmly anchored the land grant to this fixed line of its own choosing that it could not thereafter change or vary it, without legislative consent, so as to affect titles accruing thereunder or in any way affected thereby."[1]

§ 200. Mining rights on the right of way.— The use of the term "right of way" in describing the four-hundred-foot grant is all that rescues it from an absolute grant of the fee. No mining rights, however, can be asserted on the right of way after the filing of the map of definite location, as the right of the railway company then becomes fixed, and even the reservation of mineral lands does not apply thereto.[2] The supreme court of Montana furnishes a logical example of this doctrine and gives adequate reasons for the rule above announced. We adopt the reasoning: "The mineral lands excluded from the operation of this act are evidently not those covered by the right of way, as nothing could possibly be given in lieu of any land which might be needed for such purpose; and it would be destructive of the rights of the railway company if mining claims could at any time be located and worked upon the track and land covered by the right of way. . . . The joint resolution of congress of January 30, 1865, declaring that 'no act shall be so construed as to embrace mineral lands, which in all cases shall be and are hereby reserved exclusively to the United States,' cannot be considered as a reservation of mineral land from the operation of grants of the right of way, such as the one in question. A reservation of that character would annihilate the franchise, and annul the operation of the entire act of

[1] Smith v. Northern Pac. Ry. Co., 7 C. C. A. 407, 58 Fed. Rep. 513.

[2] Smith v. Northern Pac. Ry. Co., *supra;* Doran v. Central Pac. Ry. Co., 24 Cal. 245; Wilkinson v. Northern Pac. Ry. Co., 5 Mont. 538, 6 Pac. Rep. 349.

congress granting the charter. The operation of mining and the business of railroads cannot be conducted at the same time upon the same ground; and a reservation of such a character would beget a conflict of rights and a confusion of interests not in contemplation of intelligent legislative action."[1]

§ 201. No valid discovery on right of way—Extra-lateral rights.— Since the filing of the map of definite location has the effect to define the grant and to establish with certainty what particular land is claimed for the right of way, it necessarily follows that after filing the map of definite location, as required by law, no valid discovery of mineral could be made upon the right of way of a subsidized railroad, for the reason that that act fixes the railway company's title, and it then becomes appropriated to that use, ceases to be public land, and is no longer open to location.[2] The effect of such a grant as circumscribing or cutting off the extra-lateral rights, or the right to follow the vein on its downward course, has not been determined; that question will be fully considered in its proper place.[3] It is proper to say, however, at this time that no reason is perceived from the nature and quality of the grant why the owner of a vein, the strike of which is parallel to the grant, may not pursue his vein on its downward course beneath the right of way, being responsible only to the railroad company for surface support.[4] This view of the law is consonant with reason, since that right is usually granted in the mining regions, and since the United States,

[1] Wilkinson v. Northern Pac. Ry. Co., 5 Mont. 538, 6 Pac. Rep. 349; Doran v. Central Pac. Ry. Co., 24 Cal. 245; Robbins v. Milwaukee, etc. Ry. Co., 6 Wis. 636.

[2] Smith v. Northern Pac. Ry. Co., 53 Fed. Rep. 513, 7 C. C. A. 397; Erhardt v. Boaro, 113 U. S. 537; s. c., 8 Fed. Rep. 692; Golden Terra M. Co. v. Mahler, 4 M. R. 398; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 11 Fed. Rep. 125; Francour v. Newhouse, 40 Fed. Rep. 618, 17 Opp. Atty. Gen. 230; Kendall v. San Juan M. Co., 9 Colo. 349, 12 Pac. Rep. 198; s. c., 144 U. S. 658; Noonan v. Caledonian M. Co., 121 U. S. 393; Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 443.

[3] See *post*, Part XI, ch. VI, art. C.

[4] See *post*, Part XII, ch. V, art. B.

the grantor of both parties, would have the right to attach whatever limitations or reservations the law authorized.[1]

§ 202. Railroad grants in which mineral lands were withheld.— There were many railroads built in the public-land states and territories that received subsidies in the form of land grants. In all the grants to subsidized railroads, all mineral lands were reserved and excepted from the grant. A typical grant, and one which has received more attention than any other at the hands of the courts, having been oftener drawn in question, is the one commonly known as the "Northern Pacific Railroad Grant."[2] By the third section of that act there was granted: "Every alternate section of the public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections per mile on each side of said railroad wherever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."[3]

In a late case in the supreme court of the United States, where this grant was under consideration, the court reviewed at length all the acts of congress whereby subsidies in the form of land grants had been made to railway companies.[4] The court summed up the policy of the govern-

[1] Evans v. Haefner, 29 Mo. 141; Lyon v. Gormley, 53 Pa. St. 261.

[2] An act granting lands in aid of the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route; approved July 2, 1864. 13 Stat. at L., p. 365.

[3] Id., § 3; Smith v. Northern Pac. R. Co., 7 C. C. A., p. 406; 58 Fed. Rep. 513.

[4] Barden v. Northern Pac. R. Co., 154 U. S. 288; Act of July 1, 1862 (12 Stat. at L. 489); Act July 2, 1864 (13 Stat. at L. 365); Act July 4, 1866 (14 Stat. at L. 83); Act July 13, 1866 (14 Stat. at L. 94); Act July 25, 1866 (14 Stat. at L. 239); Act July 27, 1866

ment as expressed in these grants to be that of excluding and reserving, at all times and under all circumstances, from the operation of said grants, all the minerals and mineral lands within the limits of the grant. The opinion concludes in the following words: "In all these cases, and in all grants of public lands in aid of railroads, minerals (except iron and coal) have uniformly been reserved, and in no instance has such grant been held to pass them."[1]

§ 203. Policy of the government to reserve minerals.— We have seen elsewhere in this work that the early policy of the government throughout, as expressed by statute and upheld by decision, was to reserve mineral lands from sale. This policy was steadily maintained in railroad grants, and an examination of all the acts mentioned in the notes of the last section will disclose that express reservation of minerals and mineral lands, except iron and coal, was made from the grant; and as if to settle the matter beyond dispute, although there was no law then in force authorizing the taking of mineral land in any form, at the second session of the thirty-eighth congress the following joint resolution was passed: "No act passed at the first session of the thirty-eighth congress, granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirteenth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise especially provided in the act or acts making the grant."[2]

§ 204. Early definition of mineral lands—"Known minerals."—There was a disposition manifested in the earlier decisions to inject into the statute something that congress never placed there, and to attach to the definition

(14 Stat. at L. 292); Act March 2, 1867 (14 Stat. at L. 548); Act March 3, 1871 (16 Stat. at L. 573); Barden v. Northern Pac. R. Co., 154 U. S. 288, 317.

[1] Barden v. Railway Co., *supra.*

[2] 13 Stat. at L. 567; R. S. U. S., § 2326.

of minerals and mineral lands the further qualification and limitation of "known mines." Thus it was held that the meaning of the term "minerals and mineral lands," as employed in the statute, was that of "known mines" at the time that the grant took effect, viz., the filing of the map of definite location.[1] The reason for this error by the courts is easily ascertained when it is remembered that other provisions of the statute affix limitations and reservations to the grant of a lode claim, or withhold them, according as they contain or do not contain "known mines."[2] Following this error, first announced in the federal court for the northern district of California,[3] the courts enlarged to some extent upon the error; but, in a later case running in the opposite way, it was held that if at the time the grant took effect they were known to be mineral, or there was satisfactory reason to believe them to be mineral lands, the title did not pass.[4] In the one case it is plain to be seen that congress intended to reserve only "known minerals," and in the other the reservation was absolute, and the courts impressed the statute with matter it did not contain.

§ 205. Earlier decisions overruled — Mineral and mineral lands reserved, known or unknown.— So manifest was it that these interpretations of the law were opposed to the real meaning and intent of congress, that an act was passed expressly stating that mineral lands should not pass to the Northern Pacific Railroad in any event.[5] In addition to the steps thus taken by congress to settle the ques-

[1] Francour v. Newhouse, 40 Fed. 618, 43 Fed. Rep. 238; N. P. Ry. Co. v. Bardon, 46 Fed. Rep. 592; Valentine v. Valentine, 47 Fed. Rep. 597; Northern Pac. Ry. Co. v. Sanders, 49 Fed. Rep. 129; Northern Pac. Ry. Co. v. Cannon, 54 Fed. Rep. 252, 4 C. C. A. 303.

[2] Deffeback v. Hawk, 115 U. S. 392, 399; Colorado Coal & Iron Co. v. United States, 123 U. S. 307; Davis v. Weibbold, 139 U. S. 507; Richards v. Dower, 81 Cal. 44; Western Pac. R. R. Co. v. United States, 108 U. S. 510.

[3] Francour v. Newhouse, *supra.*

[4] Northern Pac. Ry. Co. v. Sanders, *supra;* Northern Pac. Ry. Co. v. Cannon, *supra.*

[5] An act to provide for the examination and classification of certain mineral lands in the states of Montana and Idaho. 28 Stat. at L. 683; 2 Supp. R. S. U. S. 385.

tion so far as the Northern Pacific grant was concerned, the supreme court of the United States, speaking through the late Mr. Justice Field, in a case involving this grant, ably reviews the entire legislation of congress on the subject, criticises the decisions of the courts, and announces the true rule in the following words: "It seems to us as plain as language can make it, that the intention of congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and, among other things, that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted or otherwise appropriated, and were free from preemption and other claims or right at the time the line of road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands, in odd sections, nearest to the line of the road, might be selected. There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. Mineral lands were not conveyed, but by the grant itself, and the subsequent resolution of congress cited, were specifically reserved to the United States, and excepted from the operations of the grant. Therefore they were not to be located at all, and if in fact located they could not pass under the grant. It is difficult to perceive the principle upon which the term 'known' is sought to be inserted in the act of congress, either to limit the extent of its grant or the extent of its mineral, though its purpose is apparent. It is to add to the convenience of the grantee and enhance the value of its grant. But to change the meaning of the act is not in the power of the plaintiff, and to insert by construction what is expressly excluded is in terms prohibited. Besides the im-

possibility, according to recognized rules of construction, of incorporating in a statute a new term,— one inconsistent with its express declaration,— there are many reasons for holding that the omission of the word 'known,' as defining the extent of the mineral lands excluded, was purposely intended. The tract granted covered a belt believed to be rich in minerals of gold and silver, and the United States were engaged at the time in a terrific conflict for the preservation of the Union, incurring an immense debt, exceeding two thousand millions, and many of their citizens engaged in the struggle looked forward hopefully and confidently to this source of relief for the burdened treasury. They knew that the mineral belt over which the proposed railway would pass was almost entirely unexplored. They therefore retained from their grant the mineral lands, whether known or unknown, and left the discovery of the minerals to future explorations, and their disposition to future legislation."[1]

§ 206. **The cases distinguished — The rule stare decisis not departed from.**— It should be observed with reference to the reasoning in the Barden case that it should not be construed as essentially overturning or overruling the two townsite cases *in toto*,[2] because it must be remembered that there has never been any question, and there can be none, as to the proposition of patenting mineral lands in townsite patents. The government does not dispose of mineral lands in this way, and the law is perfectly well settled, as we shall demonstrate when we discuss that question,[3] that townsite surface patents are frequently granted which actually cover mineral lands, but it is nowhere pretended at this day that the minerals thus pass to the grantees. Moreover, even if it be urged that the Barden case over-

[1] Barden v. Northern Pac. R. Co., 154 U. S. 288, 316-319, 38 L. ed. 992.

[2] Davis v. Weibbold, 139 U. S. 507; Deffeback v. Hawk, 115 U. S. 399.

[3] *Post*, Part X, ch. VI. See also *post*, next chapter.

rules the others, it is none the less right, both in principle and its reasoning, since, as was said by the learned justice who delivered that opinion, "it is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."[1] There has been a disposition in the land department throughout to restrict the meaning of the term "mineral lands" within much narrower limits when railroad grants are involved than in other cases. While some of their decisions are inharmonious upon the point, the better reasoned ones, and those correctly stating the law, agree with us.[2]

§ 207. Patent conclusive as to title, in the absence of fraud.— Except in those cases where the law authorizes the insertion in the patent of reservations of mineral and mineral lands, the issuance of the patent will vest an absolute title in the patentee, and this, whether the land be mineral or not, the rule being that the department can make reservations only as authorized by law, and that where there is no reservation in the patent it conveys the entire estate; so it is settled by a long line of authority that issuance of the patent by the proper officers in a case authorized by law, in the absence of fraud or concealment, conveys the title in accordance with its terms, and fixes the character of the land as mineral or non-mineral, and it is not open to inquiry thereafter upon either point.[3] So, it necessarily follows, that even though lands may be otherwise reserved, yet, when patented, the reservation ceases, and no matter what the facts may be, they are presumed to have been conclusively established according to the recitals of the patent; the reason of this rule is apparent, and is that there must

[1] Barden v. Northern Pac. Ry. Co., 154 U. S. 288-319.

[2] W. H. Hooper, 8 C. L. O. 120; H. C. Rolfe, 2 id. 66; Conlin v. Kelly, 12 L. D. 1; Shepherd v. Bird, 17 L. D. 82.

[3] Johnson v. Towsley, 13 Wall. 83. See *post*, Part X, ch. V, art. A.

be some point of time when questions of fact shall be settled, and the character of the land for all time determined; and for the interest of all parties concerned, there can be no better time to determine this question than at the issuing of the patent.[1] This observation of course, has no application to a case where the patent itself, pursuant to the law, expresses a reservation on its face. In such case, the reservation being carved out of the grant, the subject of it does not pass.

§ 208. Lieu lands — Their selection and quality. — In all the grants to railroads congress has provided that the grants shall suffer no diminution in quantity because the odd-numbered sections turn out to be lands otherwise reserved from the grant, and has authorized the selection and patenting of other agricultural unappropriated lands, lying contiguous to the grant, in lieu of those thus lost.[2] The authority is granted in the following language: "That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided."[3] Of course the plain reading of the authorization determines that these lands also fall within the same rule as do the other lands with reference to their mineral character. To prevent fur-

[1] Cowell v. Lammers, 10 Sawy. 255; Davis v. Weibbold, 139 U. S. 507; Pacific Coast M. & M. Co. v. Spargo, and Same against Fick, 16 Fed. Rep. 348, 16 M. R. 75; Steel v. St. Louis S. & R. Co., 106 U. S. 447; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Vance v. Burbank, 101 U. S. 114, 519; Northern Pac. Ry. Co. v. Cannon, 54 Fed. Rep. 252, 4 C. C. A. 303. Compare Stanley v. Mineral Union (Nev.), 63 Pac. Rep. 59.

[2] Kansas Pac. Ry. Co. v. A., T. & S. F. R. Co., 112 U. S. 414, 28 L. ed. 794; Dubuque & Pac. R. Co. v. Litchfield, 64 U. S. 66, 16 L. ed. 500; United States v. Missouri, K. & T. Ry. Co., 141 U. S. 358; United States v. Winona & St. Paul Ry. Co., 67 Fed. Rep. 948; Barney v. Winona & St. P. Ry. Co., 117 U. S. 228; Wis. Cent. Ry. Co. v. Price, 133 U. S. 496.

[3] 13 Stat. at L. 365.

ther trouble on this score congress has provided for the appointment of a commission to make selections of these lands and a classification thereof.[1] It is expressly provided therein that no patent or other evidence of title shall issue to the railway company until after such classification, and that any patent or other evidence of title issued in violation thereof shall be void.[2]

[1] Act Feb. 26, 1895 (28 Stat. at L. 683); Supp. to R. S. U. S., vol. 2, p. 985.

[2] Id., § 7.

CHAPTER VI.

TOWNSITE PATENTS, RESERVATIONS FROM.

§ 210. The statutes reviewed reserving minerals from townsite patents.
211. The view of the law upheld in the Butte City Patent Cases.
212. Review of the townsite cases — Known mines — Mining claims in fact — Effect and extent of reservations — Horsky v. Moran reviewed.
213. Statutory construction by the legislature — The courts corrected by the legislative power — The later act.
214. Reservations and not patents construed here — No title to mines passes by townsite patent.

§ 210. The statutes reviewed reserving minerals from townsite patents.— The statutory provisions by which reservations of minerals were made from townsite patents were enacted at two different times. The first provision was that: "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper; or to any valid mining claim held under existing laws."[1] This provision, standing alone, is seemingly as broad and comprehensive as are any of the reservations in the railroad grants. It is agreed by the courts on all hands that the reservations from townsite patents and from railroad grants stand more nearly on the same footing with each other than do either of them with reference to "lode-placer" reservations.[2] This being so, if the supreme court of the United States had not reached different conclusions with reference to them, it would seem that the reasoning in the Barden case would be conclusive upon this point, and that in no event could it be said that the

[1] Townsite Act approved March 2, 1867 (14 Stat. at L. 541), as amended June 8, 1868 (15 Stat. at L., p. 67); R. S. U. S., § 2392.

[2] Horsky v. Moran, 21 Mont. 345, 53 Pac. Rep. 1064, and cases there cited.

minerals, mineral lands or mines pass to the townsite patentees or grantees by virtue of the townsite patent.[1]

§ 211. The view of the law upheld in the Butte City patent cases.— The supreme court of Montana, in the early decisions, took substantially the same view of the law, as we read the cases, as the supreme court of the United States in the Barden case. The consideration of this question was before the court many times.[2] In the Butte City Smoke-House Lode Cases, which was the last examination of the question by that court until very recently,[3] there were some twenty-three cases tried together, and it was expressly held by the court that an exception in a townsite patent excluding from its operation all mines, mining claims and possessions held under existing law is an exception required by the law and is made by the law itself, and is conclusive upon the question that the government did not intend to convey by the patent any valid mine, mining claim or possession held under existing laws, and it is therefore impossible under a patent to a townsite to acquire any valid title to a mine or a mining claim or to the surface thereof.[4] This reasoning seems clear and conclusive, and if it can be said that the ruling of the supreme court of the United States in the Barden case overrules, *pro tanto*, the decisions of the three townsite cases,[5] it would seem that the ruling in the "Smoke-House" cases and in the Barden case, standing together, must be held to be a correct statement of the law on the subject.[6]

[1] Barden v. Northern Pac. Ry. Co., 154 U. S. 288.

[2] Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. Rep. 570; Talbott v. King, 6 Mont. 76, 9 Pac. Rep. 434; King v. Thomas, 6 Mont. 409, 12 Pac. Rep. 865, and other cases considered in the same case.

[3] Horsky v. Moran, 21 Mont. 345, 53 Pac. Rep. 1064.

[4] Butte City Smoke-House Lode Cases, *sub nom.* Murray v Buol et al., 6 Mont. 397, 12 Pac. Rep. 858.

[5] Davis v. Weibbold, 139 U. S. 507, 35 L. ed. 238; Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305.

[6] Barden v. N. P. R. Co., 154 U. S. 288.

§ 212. Review of the townsite cases — Known mines — Mining claims in fact — Effect and extent of reservations — Horsky v. Moran reviewed. — In the three leading townsite cases that came before the supreme court of the United States,[1] all seemed to turn upon the question and the point as to whether the lode or vein was known to exist at the time of issuing the townsite patent. With entire deference to the court, it would seem that this is importing into the statute a limitation which the words themselves do not justify,[2] unless it can be said that the words, "held under existing law," import the meaning that, to operate as a reservation, the mine or mining claim must be actually held, located and owned at the time of the patent. And if so, whence the words "known to exist," and what is covered and included by them? Besides, the words "held under existing law" refer to the words "any valid mining claim," and not to the preceding portion of the section.

If the courts were not justified in limiting the railroad grants in this way, it seems quite clear that they are not justified in so limiting townsite grants. If it be said that here is a reservation of a right without the means for its enjoyment, the answer is quickly made that the reservation itself, as will be demonstrated in another part of this work,[3] carries with it all the means necessary to effectuate the purposes of the reservation and to enjoy the estate reserved. Besides, the land department has logically decided that it is a patentable interest, and is so reserved.[4]

It is true the supreme court of Montana seems to reach a somewhat different conclusion in a late case which was twice before the court.[5] In this case the court, by adopting

[1] Deffeback v. Hawke, 115 U. S. 392; Davis v. Weibbold, 139 U. S. 507; Dower v. Richards, 151 U. S. 658, 37 L. ed. 305.

[2] Barden v. N. P. R. Co., 154 U. S. 288.

[3] See *post*, Part XII, ch. IV; also §§ 1009–12.

[4] Pacific Slope Lode v. Butte Townsite, 25 L. D. 518; Gregory Lode Claim, 26 L. D. 144.

[5] Horsky v. Moran, 21 Mont. 345, 53 Pac. Rep. 1064; s. c. 18 Mont. 250, 34 Pac. Rep. 860.

the decision and opinion of the trial judge, made an exhaustive research of the cases in a very thoughtful and carefully considered opinion; an opinion, nevertheless, which we do not discredit in the least as an exhaustive collection of the cases, when we say that a portion of it was threshing old straw and unnecessary to the conclusion reached; and another portion was a very elaborate attempt to decide the case upon an involved point, to wit, the force and effect of a United States patent as to the rights granted, rather than the real point of arriving at the force and effect of the reservation contained in the patent and required by the law itself. As the case itself was decided upon the ground that the plaintiff had been guilty of laches in the prosecution of his claim, and upon that ground alone the supreme court of the United States refused to accept jurisdiction over the case upon writ of error,[1] much of the discussion must be relegated to the field of *dictum*. The position taken by both courts, however, will be found difficult to defend. If there was a reservation, the ground reserved never passed to the patentee, and was at all times subject to location and occupation as a mining claim.[2]

We think the real question involved was whether the minerals passed to the townsite under the patent. Besides, in either view of the case, *i. e.* whether as an absolute reservation of minerals or as a reservation of "known mines," or "mines known to exist," the rule adopted by the court would require a speedy assertion of the right to prevent the townsite claimant from acquiring something by the statute of limitations (a preposterous doctrine) which did not pass by the patent. If congress meant "known" mines, it were easy to say so, and that it did not is evidenced by the legislation we shall examine in the next section.

§ 213. Statutory construction by the legislature — The courts corrected by the legislative power — The later act. — When courts erroneously interpret statutes, even though done upon the lines recognized by the best

[1] Moran v. Horsky, 178 U. S. 205. [2] See authorities in note 4, *ante*, p. 180.

principles of statutory construction, or where the legislative body has been unfortunate in the employment of words to express its meaning, and a construction in consonance with the express legislative intent, but different from the real intent, has resulted, and the legislative body observes the consequent centrifugal tendency of the courts, it is its province to correct this tendency, or misconstruction of the statute, by a renewed and corrected expression of the legislative will. Congress, mindful of this power, and doubtless disappointed at the construction placed upon the law by the courts, for many of the decisions had been made by state courts, and one at least[1] by the supreme court of the United States prior thereto, passed an act wherein is found the following provisions:

"That townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law.

"When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority, or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof, and when entry has been made or patent issued for such incorporated town or city, the possessor of such mineral veins may enter and receive patent for such mineral vein, and the surface ground appertaining thereto:

"Provided, that no entry shall be made by such mineral claimant for surface ground where the owner or occupier of the surface ground shall have the possession of the same before the inception of the title of the mineral-vein applicant."[2]

[1] Deffebach v. Hawke, 115 U. S. 392, 29 L. ed. 115.

[2] Act to repeal timber culture laws and for other purposes, approved March 3, 1891, sec. 16 (26 Stat. at L. 1095), 2 Supp. R. S. U. S., 940, 945.

Of course this statute has no retroactive effect, in so far as it may be held to be new and different legislation, from that before existing; but in respect to those features which are mere continuing provisions of the old law, and to those parts which have the effect to construe or interpret the former statute, it must be followed in the determination of rights acquired under the former statute.

§ 214. Reservations and not patents construed here — No title to mines passes by townsite patent. — In this part of our work we are dealing with reservations solely, and not with the question of the patent, its effect and value, which will be considered elsewhere in this work;[1] nor with extra-lateral rights as affected by townsite patents, which will also receive attention elsewhere.[2] There is no question raised by the statute or in any of the adjudged cases where a mine or mining claim is actually possessed and worked at the time of the issuance of the townsite patent; as to such a claim or mine, there can be no question, and there has been none, but that it is reserved from the effect and operation of the grant. The question has been as to claims that are partly worked out or not absolutely known to exist within the townsite. Congress has expressly recognized the right to locate a townsite upon mineral land, but as the law now stands neither known nor unknown mines or minerals pass to townsite patentees or their grantees.

[1] *Post*, Part X, chs. IV, V. [2] Part XI, ch. VI, art. C.

CHAPTER VII.

STATE GRANTS FOR EDUCATIONAL AND OTHER PURPOSES.

ARTICLE A.

Educational Grants.

§ 217. Introductory — Early policy to foster education.
218. General observations — Different kinds of grants — Educational grants reserving mines and minerals.
219. Reservations expressed or implied — Enumeration of reservations in enabling act.

§ 217. Introductory — Early policy to foster education. — Beginning very early in its history, the government announced a policy in the ordinance of 1785, which was confirmed in the erection of a portion of the Northwestern Territory into the state of Ohio, of setting aside at least one section in each township for the benefit of education. At first section sixteen alone was set aside and dedicated to this use. Later, and indeed with reference to nearly all the states, sections sixteen and thirty-six were so set aside.[1] In some of the later legislation, additional land, in some cases specific sections,[2] and in others specific quantities of land, were so set aside and appropriated[3] for the benefit of education, or, as remarked by the court, quoting from the law, in order that "schools and the means of education should be forever encouraged."[4] Pursuing this policy, additional educational grants have from time to time been made, besides which other grants to the states upon their creation have

[1] Ord. 1785; Cooper v. Roberts, 18 How. 173, 15 L. ed. 338.

[2] New Mexico and Utah, Act of Sept. 9, 1850. See 9 Stat. at L., p. 446. See also *post*, art. B, this chapter.

[3] Enabling Act of the State of Utah, 28 Stat. at L. 107; 2 Supp. R. S. U. S. 197, § 678. See *post*, art. B, §§ 221, 222, this chapter.

[4] Cooper v. Roberts, *supra*.

been made for various purposes. In some of these grants there was an express reservation of mineral lands; but where the reservation was not express, much contrariety of opinion has resulted as to what general policy was to be applied, resulting, as a general rule, in the most reasonable conclusion, namely, that congress intended that the general controlling policy of the time should apply, and according as it resulted in a reservation from the state, flowing from the policy now in force, of granting mineral lands in one way only,[1] or the former policy of leasing lands, or not parting with title at all, so has it been held that those lands containing minerals were withheld from grants to the state. For example, when the government, pursuant to statute, leased its lands containing minerals, it was held that the grant of the school sections carried with them the mineral;[2] while later decisions, under a different policy, declare the now prevailing and settled doctrine, and one in consonance with the present policy of the law, to be that of withholdholding mineral lands from the operation of these grants.[3] In this inquiry we are concerned with three propositions:

First. Educational grants in all their different features and kinds, and of the different acts of congress creating the same, together with the decisions thereunder, and the conclusions to be deduced therefrom, as to whether the minerals were granted or reserved.

Second. The various other state grants for different state purposes, or by reason of indemnity or in lieu of educational grants of specific sections, which are held by the depart-

[1] R. S. U. S., §§ 2319–2326; Barden v. Northern Pac. R. Co., 154 U. S. 288.

[2] Cooper v. Roberts, *supra.*

[3] Act concerning boundaries of the state of Nevada, 13 Stat. at L. 43; Act concerning certain land granted to the state of Nevada, approved July 4, 1866, 14 Stat. at L. 85; Enabling Act of Colorado, March 3, 1875, 18 Stat. at L. 474; Townsite of Silver Cliff v. State of Colorado, Copp's Min. Lands, 261, 262; Sherman v. Buick, 93 U. S. 209; Broder v. Natoma W. & M. Co., 96 U. S. 165; Giovanni Le Franchi, 3 L. D. 229; Perkins v. C. P. R. R. Co., 1 L. D. 256. See also Stanley v. Mineral Union (Nev.), 68 Pac. Rep. 59.

ment to mean grants of the same number of sections "not in place;"[1] that is to say, that they were grants of the same number of sections, but not in the same place as originally granted, and the effect of the decisions upon them.

Third. Express renunciations of mineral lands by states and the effect of such renunciation upon the rights of the respective grantees. We will consider these matters in their order.

§ 218. General observations—Different kinds of grants—Educational grants reserving mines and minerals.— As indicated in the last section, the earlier grants for educational purposes set apart section sixteen only, and by later grants sixteen and thirty-six were both set aside, and, as indicated in the preceding section, this rule was adhered to in the creation of all the territories, commencing with Utah and New Mexico. A grant was also made of two townships in each of the public-land states for university purposes,[2] besides which there was an additional grant commonly called the agricultural college grant,[3] which was a grant of thirty thousand acres in each public-land state for each senator and representative accredited to such state under the apportionment of 1860;[4] and in the states that had no public lands, by this act there was authorized to be issued what was called agricultural college scrip, which might be purchased by pre-emption claimants, and used in lieu of money in payment for any lands which might be taken under the provisions of the act in any public-land state.[5] In some of the states, however, specific additional educational grants were made. By such as these California acquired one hundred and fifty thousand acres under the act entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agri-

[1] Re State of Colorado, 6 L. D. 412.

[2] Act of Feb. 21, 1845, Utah, 10 Stat. at L., p. 611; New Mexico, id., p. 309.

[3] Act of July 2, 1862, 12 Stat. at L. 503.

[4] Public Domain, p. 229.

[5] Act of July 1, 1870, R. S. U. S., § 2278.

cultural and mechanic arts."[1] By this grant minerals and mineral lands were expressly excluded. In addition to this grant California acquired seventy-two sections for the benefit of seminary purposes.[2] Minerals were also excluded from this grant. In Utah there was a specific grant of sections two and thirty-two in each township, in addition to the two sections previously authorized,[3] besides which there was an additional grant of one hundred and ten thousand acres, including all saline lands, for the use of the university and two hundred thousand acres for the use of the agricultural college.[4]

None of these grants expressly excluded mineral lands except the agricultural college grant and the grants to California, but they generally applied to unappropriated, unoccupied public lands, from which the deduction was easily made that mineral lands were excluded,[5] and the department, by a uniform line of decisions, adopted this construction.[6] There were other grants to the various western states in their enabling acts and otherwise, but we have enumerated enough for the purpose of this work, which is merely to give the reasons for the decisions on the subject of mining law, the foregoing being cited more as examples than as attempting to reproduce an entire list of the grants.

§ 219. Reservations expressed or implied — Enumeration of reservations in enabling acts.— We have already adverted to the effect of the general policy of the government to dispose of mineral lands only in one way, and to

[1] Act of July 2, 1862, 12 Stat. at L. 503.

[2] 10 Stat. at L. 244.

[3] Enabling Act of Utah, July 16, 1894, 28 Stat. at L. 107; 2 Supp. R. S. U. S., p. 197, § 6.

[4] Id., § 8.

[5] Ivanhoe M. Co. v. Keystone Con. M. Co., 102 U. S. 167.

[6] Commissioner Williamson to Denver office, March 30, 1877, Copp's Mineral Lands, 341, citing Hogden v. California, id. 342; Re Le Franchi, 3 L. D. 229; Keystone Lode v. Nevada, 15 L. D. 259; California v. Poley & Thomas, Copp's Mineral Lands, 212. See also Circular of Nov. 27, 1896, 23 L. D. 459; Re State of Colorado, 6 L. D. 412; Townsite of Silver Cliff v. Colorado, Copp's Mineral Lands, 261.

reserve them in all cases where their express disposition is not authorized, and to reserve them in all cases where grants of lands are made in aid of any *quasi*-public function. In some of the grants, however, the statutes are entirely silent upon the subject. For example, New Mexico,[1] Utah,[2] Arizona,[3] Colorado,[4] Washington,[5] Idaho,[6] Nevada,[7] Dakota[8] and Montana;[9] that is to say, in the inceptive grant made upon the creation of the territory.

In the enabling acts, however, of many of the states above mentioned, notably Colorado,[10] North Dakota, South Dakota, Montana and Washington,[11] Wyoming[12] and Idaho,[13] the express provision was made that "all mineral lands shall be excepted from the operation and grants of this act," and as if to entrench the settled policy, congress had, as indicated in the previous section, inserted a provision which was never repealed reading as follows: "But nothing herein contained shall be construed as granting the title in fee to any minerals held by possessory titles in the mining states and territories."[14] Oregon has a similar provision.[15]

The general policy is announced by the statute itself in the following words: "In all cases lands valuable for minerals shall be reserved from sale except as otherwise directed by law."[16]

[1] Act of September 9, 1850, 9 Stat. at L. 446–452.

[2] Act of September 9, 1850, 10 Stat. at L. 611.

[3] Act of February 24, 1863, 12 Stat. at L. 665.

[4] Act of February 28, 1861, 12 Stat. at L. 172.

[5] Act of March 2, 1853, 10 Stat. at L. 172–179.

[6] Act of March 3, 1863, 12 Stat. at L. 808–814.

[7] Act of March 2, 1861, 12 Stat. at L. 209–214.

[8] Act of March 2, 1861, 12 Stat. at L. 239–244.

[9] Act of March 26, 1864, 13 Stat. at L. 85–91.

[10] Act of March 3, 1875, 18 Stat. at L. 474–476.

[11] Act of February 22, 1889, 25 Stat. at L. 676–681.

[12] Act of July 10, 1890, 26 Stat. at L. 222–224.

[13] Act of July 3, 1890, 26 Stat. at L. 215–217.

[14] Act of May 6, 1866, 13 Stat. at L. 43.

[15] Act of September 27, 1850, 9 Stat. at L. 500.

[16] R. S. U. S., § 2318.

In California, or rather in the grants affecting that state, as well as in the state of Utah, there was no express provision, either in the act ratifying the organization of the state in the former case, nor in the enabling act of the latter, in any manner affecting mineral lands in sections sixteen and thirty-six; but it can no longer be doubted, when the policy we have foreshadowed in this section is accurately understood and given full force, that congress intended to withhold mineral lands within sections sixteen and thirty-six, as well as all other educational grants, from the operation of the statute.

Article B.

Other State Grants and Lieu Lands.

§ 221. Lieu lands in the same category — Mines and minerals reserved from all lieu lands.
222. Grants to states for other purposes — Mineral reservations.
223. When the state grants take effect — Final selection, approval and patent.
224. Selection and approval as a patent — When the title passes.
225. How the selection may be set aside.
226. Mineral character of the land — To what time applies — What questions involved.

§ 221. Lieu lands in the same category — Mines and minerals reserved from all lieu lands.— It would scarcely seem necessary to observe that wherever sections sixteen or thirty-six or any other specific sections have been previously settled upon, under homestead or pre-emption law, or because they are mineral, or for any other reason have been lost to the state, and other lands in lieu thereof granted to it, such lieu lands must of necessity stand in the same relationship to grantor and grantee — that is to say, the United States and the states respectively — as do those defined in the original grant.

By act of congress the pre-emption laws of 1841 were extended over public lands in California,[1] and by a proviso

[1] Act of March 3, 1853, 10 Stat. at L. 246. See also 5 Stat. at L. 455.

this exception was made: "Excepting also . . . the mineral lands;"[1] and containing a further provision authorizing the selection of lieu lands, but with this proviso: "Nor shall any person obtain the benefit of this act by a settlement or location on mineral lands."[2] One Mullan made a claim upon certain land known to contain coal, and obtained a selection thereof by the state and the approval of such selection by the secretary of the interior. In due time the patent of the state issued therefor, and in holding that the lieu lands stood in the same position as the original lands, and that therefore the United States could set aside the selection and listing so made, Judge Sawyer uses these words: "From these considerations I am of the opinion that the land in question was not subject to selection, and that the secretary of the interior had no power to list over to the state, or the state to grant a valid patent for it. The land not only contained coal mines, but, in the language of the act of 1841, 'known mines' of coal, which were being actually and notoriously worked, and had been so worked for a period of seven years at the time defendant Mullan applied for their purchase from the state, and more than eleven years when he assigned to defendant Avery. The state had no vested right, as is claimed by defendant's counsel it had, to select lands in lieu of sections sixteen and thirty-six, so that the right to select could not be withdrawn from any particular lands or class of lands at any time before selection actually made. The indefeasible right to any particular land can only attach at the time of selection. . . . The patent issued thereon by the state can be decreed void or annulled on a bill in chancery directly filed by the United States for that purpose. . . . In cases like this there is no jurisdiction or power in the officers of the land department to affect the title of the United States. There were 'known mines' on the land openly and notoriously worked."[3]

[1] 10 Stat. at L. 246, sec. 6.

[2] Act of March 3, 1853, 10 Stat. at L. 246–47, sec. 7.

[3] United States v. Mullan, 10 Fed. Rep. 785. See also Ryan v. Canadian Pac. Ry. Co., 5 Sawy. 260; af-

The supreme court of the United States used even stronger language in upholding the position of the circuit court. Speaking through Mr. Chief Justice Waite, the court say: "At the time the selection was actually made, therefore, it cannot be doubted that the land was mineral land, both in law and in fact, within the meaning of the act under which the state and those who purchased from the state undertook to acquire title; and we agree with the circuit court in the opinion that the rights of the parties are to be determined by the law as it stood then. Such being the case, we have no hesitation in deciding that the land was not open to the state for selection."[1] It follows from the foregoing that lieu lands stand in the same category as the original selection, and that if mineral in character, title thereto will not pass in pursuance of either grant.

§ 222. Grants to states for other purposes — Mineral reservations.—Various other grants have been made for state purposes. It would be foreign to the purpose of this work to enumerate them in detail. In some of them, for example, the act granting five hundred thousand acres to each of the public-land states for internal improvements,[2] minerals and mineral lands are expressly excluded, while in others, notably those mentioned in the enabling act of Utah,[3] no express reservation of minerals or mineral lands was made; but enough has appeared herein to demonstrate the settled policy of the government not to part with mineral lands in this way, and the same may be said of all general grants, for instance, those that apply to all the states;[4] and as if to emphasize this policy, the land department, by circular sent to the various land offices, disclosed the determination to prevent the selection of mineral lands by any of the states

firmed, s. c., 99 U. S. 388; Hunton v. Frisbie, 37 Cal. 476; Frisbie v. Whitney, 9 Wall. 187.

[1] Mullan v. United States, 118 U. S. 271, 30 L. ed. 171.

[2] Act of Sept. 4, 1841, 5 Stat. at L. 453.

[3] Enabling Act of State of Utah, 28 Stat. at L. 107; 2 Supp. R. S. U. S., p. 197, §§ 7, 8.

[4] R. S. U. S., §§ 2378, 2379.

under any of these grants by the following words: "If any of the lands selected are found, upon examination, to be within a township containing any mineral entry, claim or location, you will at once notify the proper state officer as to the specific tracts, and require him to at once publish notice in some newspaper of general circulation (to be designated by you) within the vicinity of said lands, setting forth that the state has applied for the lands designated, and has filed lists for the same in your office, that said lists are open to the public for inspection, and that a copy of the same by descriptive subdivisions has been conspicuously posted in your office for inspection by persons interested, and the public generally; and that you will receive protests or contests within the next sixty days for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes."[1]

§ 223. When the state grants take effect — Final selection, approval and patent.— In an early case under a statute silent upon the question, but the decision in which was rendered at a time when the United States leased their mineral lands, it was held that the grant being one *in præsenti*, as to which all will agree, the effect was to vest title to the school land and the sections thereof definitely ascertained, unconditionally in the state upon the survey and ascertainment of the position of the section.[2] The court, however, lost sight of the principle that the exception, if there was one, would also take effect at the same time,[3] and following which, where the policy was to reserve the mineral land, the same would be reserved. Some of the cases have held that the land being definitely ascertained at the time of the survey, if the state was already admitted, the grant would attach as of that date;[4] others hold that if the land is sur-

[1] Circular of Nov. 27, 1896, 23 L. D. 459. See also 19 L. D. 21.

[2] Cooper v. Roberts, *infra*.

[3] Barden v. N. Pac. R. Co., 154 U. S. 288; Heydenfeldt v. Daney G. & S. M. Co., 10 Nev. 290.

[4] Cooper v. Roberts, 18 How. 173 (59 U. S.), 15 L. ed. 338; California v. Poley, Copp's Min. Lands (2d ed.), p. 212. See Finney v. Bergur, 50 Cal. 248; Middleton v. Lowe, 30 Cal. 604.

veyed at the date of admission, the grant attaches as of the date of admission;[1] while still others hold, and we apprehend this is the true rule, that since the state can only acquire in any event the particular quality of land granted to it, it cannot and does not acquire an indefeasible estate to mineral lands until the patent is actually issued to the grantee of the state, for the reason that the general policy of the government is to part with mineral lands only in one way.[2] Nor will such an estate in all cases then pass; for example, where the land is notoriously mineral at the time of the selection, it has been held, and we think correctly, that the title to mineral land does not so pass, and that the apparent title may be set aside at the suit of the government;[3] whence it follows that the maxim, *expressio unius est exclusio alterius*, applies, and, the facts being known, title can be acquired to mineral lands in no other way than as provided by the statute on that subject.[4]

§ 224. Selection and approval as a patent — When the title passes.— In practice, some contrariety of opinion has existed as to whether the title passes from the United States upon the selection and approval by the commissioner of the general land office, or whether it requires specific patents to each particular piece, and there is good ground, seemingly, for this diversity of opinion. By one section of the statute,[5]

[1] Townsite of Silver Cliff v. Colorado, Copp's Min. Lands (2d ed.), p. 261-63; Warner v. Colorado, 14 L. D. 681.

[2] Barden v. N. Pac. R. Co., *ante*, p. 192, n. 3; Heydenfeldt v. Daney G. & S. M. Co., Id.; Ivanhoe M. Co. v. Keystone Con. M. Co., 102 U. S. 167; Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. Rep. 611; Sherman v. Buick, 93 U. S. 209; Natoma W. & M. Co. v. Bugby, 96 U. S. 165.

[3] Stanley v. Mineral Union (Nev.), 63 Pac. Rep. 59; Heydenfeldt v. Daney G. & S. M. Co., *supra*, both decided under peculiar circumstances of estoppel. See Ivanhoe M. Co. v. Keystone Con. M. Co., *supra*. See also Boulder v. Buffalo M. Co., 7 L. D. 54; Fleetwood Lode, 12 L. D. 604.

[4] Commissioner Williamson to Denver Office, Copp's Min. Lands (2d ed.), p. 341; Keystone Con. M. Co. v. California, Copp's Min. Lands, p. 101; Keystone Lode & Mill Site v. Nevada, 15 L. D. 259.

[5] Act of December 22, 1854, 10 Stat. at L. 599; R. S. U. S., § 2447.

later in date of passage but earlier in position in the revision of the statutes, provision was made for patenting of all land claims confirmed to any person in any state or territory. But by another section, earlier in date it is true, but later in position in the revision, and clearer in statement, it is provided that: "Where lands have been and may hereafter be granted by any law of congress to any one of the several states and territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the commissioner of the general land office, under the seal of his office, either as originals or copies of the originals or records, shall be regarded as conveying the fee-simple of all the lands embraced in such lists that are of the character contemplated by such act of congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."[1] And it has been repeatedly held by federal courts, and by the supreme court of the United States, that such selection is equivalent to a patent.[2]

§ 225. How the selection may be set aside.— In the preceding section[3] enough appeared to demonstrate that the selections of land by the state and approved by the commissioner are only final under the circumstances that a patent

[1] Act of August 8, 1854, 10 Stat. at L. 346; R. S. U. S., § 2449.

[2] Buena Vista Petroleum Co. v. Tulere Oil & M. Co., 67 Fed. Rep. 226, citing Frasher v. O'Conner, 115 U. S. 102; Mower v. Fletcher, 116 U. S. 380; McCreery v. Askell, 119 U. S. 327; Wright v. Roseberry, 121 U. S. 488; Chandler v. Calumet & Hecla M. Co., 149 U. S. 79. See also Barden v. N. Pac. R. Co., 154 U. S. 288; Knight v. United Land Ass'n, 142 U. S. 161, 35 L. ed. 974.

[3] See *ante*, § 221. See also United States v. Mullan, 10 Fed. Rep. 785; affirmed, s. c. *sub nom.* Mullan v. United States, 118 U. S. 271.

is final, and since they operate as a patent and are, to all intents and purposes, the patent to the state of the particular lands described, it must necessarily follow that the selection may be set aside for the same reasons that a patent can be set aside, the consideration of which question is postponed to a later branch of this work.[1]

§ 226. Mineral character of the land — To what time applies — What questions involved.— In all such inquiries, and in all inquiries relative to the selection of the land, the principal question involved is the character of the land as being mineral or non-mineral, that is, so far as this work is concerned in its investigation, and it becomes important to determine at what point of time this particular investigation and decision are applied. It would seem that the cogent statement in a preceding section as to railroad grants applies with equal force here, and that the time of selection and approval by the commissioner is the one to which all inquiries must be addressed. Manifestly, the general description of mineral land, and what is included by the term as we have attempted to reproduce them in the preceding pages of this work, must be the decisive criterion in all such investigations. Obviously, too, as in all cases, the return of the surveyor-general through his deputies is *prima facie* evidence of the character of the land, but it is only *prima facie*, and is open to rebuttal and dispute at any time prior to the confirmation by the commissioner of the selections made by the state. It is also open to dispute for actual fraud or misrepresentation at any time within the period of limitations, at the suit of the government. There are certain cases, however, respecting the return of the surveyor, wherein the return imports on its face investigation, and would therefore seem to be entitled to greater weight. For example, if certain land within an agricultural area was returned as mineral, or within a mineral area was returned as non-mineral, this would seem to indicate investiga-

[1] See *post*, Part X, ch. V, art. C.

tion, and therefore a stronger claim for belief; and where specific sections are granted to the state, as, for example, sixteen and thirty-six, and they are returned by the surveyor as mineral, this is a sufficient authority upon which to make a selection of lieu or indemnity lands,[1] and the change of position affected thereby works an estoppel upon both parties.[2]

Article C.

Effect of State Renunciation.

§ 228. Estoppel to state by renunciation.
229. Review of reservations.

§ 228. Estoppel to state by renunciation.—Pursuing the thought enunciated in a preceding section,[3] it must be quite apparent that where the state, by legislative declaration, surrenders all claim to mineral lands and authorizes locations to be made upon lands otherwise falling to the state, such declaration is conclusive; and even though the state officers may afterwards assume to grant a state patent to any such land, if there is a valid mining claim upon it, or if it is mineral land, the grantee of the state acquires no title thereby. As was said by the supreme court of Nevada, speaking of the statute of that state: "The passage of said act was a recognition by the legislature of this state of the validity of the claim made by the government of the United States to the mineral lands. Whatever might, therefore, be the construction of the language of the enabling act, as interpreted from the act itself, we think it controlled by the subsequent legislation we have referred to, and that the title of the state to the land conveyed to appellant's grantors was, at the time of the survey thereof, subject to the terms

[1] Johnson v. Morris, 72 Fed. Rep. 890; John W. Moore, 13 L. D. 64; State of California, 23 L. D. 423. See also Sutton v. Minnesota, 7 L. D. 762.

[2] Bishop of Nesqually v. Gibbon, 158 U. S. 155; Blight v. Rochester, 20 U. S. (7 Wheat.) 535.

[3] See *ante*, § 226.

and conditions imposed by the act of congress of July 4, 1866, and as the portion of said land in controversy in this action was then 'rich in minerals,' and occupied and claimed by respondent's grantors for mining purposes, the grantors of appellant acquired no title thereto by virtue of the patent issued by this state."[1]

So under another grant to the state under a statute later than any we have heretofore mentioned,[2] where mineral lands are expressly excepted from the operation of the grant, and where in the same statute the state was authorized to dispose of such land under such terms as it should see fit for the purpose therein provided, and where the state, by its statute enacted in pursuance of such authority, and in providing for the disposal of said grant, enacted in direct terms that nothing in the act contained should be so construed as to prevent persons entering upon any of the land described for prospecting or mining purposes,[3] and where the officers of the state patented certain lands to S. upon which M. had valid and subsisting mining claims, the supreme court of Nevada held that S. acquired no title by his patent and that the possession and claim of M. was valid notwithstanding such patent.[4] This matter is further considered in a previous part of this work,[5] and we merely mention it in its aspect as a reservation at this time and without any thought that the statute in its letter can be enforced.

§ 229. **Review of reservations.**— It will thus be seen that in all grants to the state composing the public mineral-land states of the Union in aid of education and for other state purposes, including the regular school sections sixteen and thirty-six, congress has in many instances excepted by express provisions from the grant all mineral lands, known

[1] Heydenfeldt v. Daney G. & S. M. Co., 10 Nev. 290.

[2] Act of June 16, 1880, 21 Stat. at L. 287.

[3] Act of March 5, 1887, Compiled Laws of Nevada of 1900, §§ 325, 327.

[4] Stanley v. Mineral Union, Limited, 63 Pac. Rep. 59.

[5] *Ante*, §§ 162, 163.

mines and salines; and that in all other cases where the policy has not been expressed in the statute, it has nevertheless been recognized and enforced by the courts to the end that those grants do not convey mineral lands. In general, it may be said, the rule which governs the acquisition of mineral lands applies with equal force to these grants; and decisions under the one, as a general rule, bear with equal force upon the questions involved in the other. Whence it follows that upon these sections, at any time prior to the confirmation by the commissioner to the state, valid mining locations may be made and possession taken thereunder.

CHAPTER VIII.

RESERVATIONS IN AGRICULTURAL GRANTS AND PATENTS, AND STATUTES AUTHORIZING THE SAME — MISCELLANEOUS RESERVATIONS.

§ 232. Known mines and minerals excepted from agricultural patents.
233. Naked possession — How far a reservation.
234. The common-law possession — Not good as against location peaceably made.
235. Possession for the purpose of making a location.
236. Summary of naked possession and its effect as a reservation.
237. The statutory tunnel as a reservation.

§ 232. Known mines and minerals excepted from agricultural patents.— The general questions arising from conflicts in patents will be discussed further on in this work;[1] but as we have already seen, there has been a distinction in all the grants, or rather, perhaps, a different way of expressing the general intent to withhold and reserve mines and mineral lands. Thus, in the pre-emption law of 1841[2] we find what was probably the beginning of the phrase "known mines." In that statute, in specifying the different classes of lands not subject to the rights of pre-emption, congress employed these words: "*Fourth.* Lands on which are situated any known salines or mines."[3] Here then was the beginning of the phrase which crept into so many of the California decisions, and into the townsite cases, until it was excluded by the Barden case as having no place in the decision of any of those cases, because not specified, in those terms, in the grants creating the reservation. There was a similar provision embodied in the mining law of 1872, with reference to placers containing a lode,[4]

[1] *Post*, Part X, ch. VI.

[2] Act of Sept. 4, 1841, 5 Stat. at L., p. 455.

[3] Id., sec. 10; R. S. U. S., § 2258.

[4] R. S. U. S., § 2333.

and inasmuch as many of the decisions on that particular phrase and expression cluster around those particular sections of the law and their interpretation, we will postpone the further consideration of this question to that part of our work.[1]

§ 233. Naked possession — How far a reservation. — We have already shown to some extent how the miner's *quasi*-right of possession of mineral lands was recognized by state legislation, and was at least sanctioned and permitted by congress. In some earlier decisions, when mining was recognized as a sort of public use in California, an attempt was made to authorize the invasion of private lands for the purpose of searching for and working mines — a right, it may be observed, which existed and which now exists in Mexico, and which may also be asserted in some parts of the Dominion of Canada. A revulsion of sentiment, however, quickly followed in California, and, as frequently occurs, produced exactly opposite results, one extreme following another, and in place of the rule permitting the invasion of private property came one whereby a person in the possession of land was deemed rightfully possessed.[2]

Prior to the enactment of the laws of congress authorizing the acquisition of titles to mining claims by location, working and patent, the strength and value of possessory rights was necessarily observed and respected to a greater extent than would be necessary since that time, resulting in a rule whereby the fact of possession, regardless of any other right, was sufficient to maintain ejectment and all other appropriate remedies against all seeking to invade the possession.[3]

[1] *Post*, Part X, ch. II. See also Part VI, ch. IV.

[2] Hughes v. Devlin, 23 Cal. 501; Brandt v. Wheaton, 52 Cal. 430; Gibson v. Puchta, 33 Cal. 311.

[3] Campbell v. Rankin, 99 U. S. 261; Sparks v. Pierce, 115 U. S. 408; Basey v. Gallagher, 20 Wall. 670; Chapman v. Toy Long, 4 Sawy. 28; Faxon v. Barnard, 2 McCrary, 44, 4 Fed. Rep. 702; Hess v. Winder, 30 Cal. 355; Morenhaut v. Wilson, 52 Cal. 263; Garthe v. Hart, 73 Cal. 541; Weise v. Barker, 7 Colo. 178, 2 Pac.

Growing out of this rule proceeded the doctrine under which it was enunciated by the supreme court of the United States[1] that a location, to be valid, must be good when made. From this principle flows the rule that mere possession of a mining claim will be protected against one having no better title;[2] so it has been held that mere possession of a mining claim, whether based on a valid location or not, will prevent a location thereof by other parties;[3] and mere possession, not based on a location, must be held good against one having no better title; but to be available such possession must be actual, and it has been held that it would not extend to the full extent of a mining claim, but only to the part actually occupied.[4] The better rule, however, is probably the other way, and one in possession of a mining claim, performing any of the acts of location, has a reservation in his favor for a reasonable time in which to complete his location.[5]

§ 234. The common-law possession — Not good as against location peaceably made. — Speaking of naked possession, it may be said that such possession, covering familiar lines, is good against one showing no higher right. But unless boundaries are marked, or some act done to show extent of possession, and an intention manifested to claim under mining law, it is only good to the amount possessed in any event. Nor is such possession good against a valid

Rep. 919; Patterson v. Tarbell, 26 Oreg. 29; Noyes v. Black, 4 Mont. 527; Hopkins v. Noyes, 4 Mont. 550.

[1] Belk v. Meagher, 104 U. S. 279. See also Omar v. Soper, 11 Colo. 389, 18 Pac. Rep. 443.

[2] Patchen v. Keeley, 19 Nev. 404; Crossman v. Pendery, 8 Fed. Rep. 693.

[3] Weise v. Barker, *ante*, p. 200, n. 3.

[4] Zollers v. Evans, 2 McCrary, 89, 5 Fed. Rep. 172. The supreme court of California recently held that occupation of land merely as a mill-site cannot give right to minerals; in other words, title cannot be acquired to mineral land by occupancy alone; nor to the minerals found by an employee while working on a mill-site grade for the mill-site claimant, and, notwithstanding his employment, the employee (a minor) has title against his employers. Burns v. Clark (Cal.), 66 Pac. Rep. 12.

[5] Erhardt v. Boaro, 113 U. S. 527.

location peaceably made; and it may be considered settled that mere possession alone gives no right against a *bona fide* miner or prospector seeking to acquire title to the land as a mining claim, who enters peaceably for that purpose. So it may be said that while actual possession was necessarily recognized in order to prevent breaches of the peace, the later and better considered cases, while not so numerous, yet being decided under different conditions and their decision being guided by different rules, may be considered as expressing the general trend of judicial sentiment, to the effect that a mere naked possession of mining land, independent of any other right, is not good as against a subsequent peaceable entry and location made in compliance with the law, and for the purpose of holding the land as a mining claim, by another. In other words, where there is no valid location there can be no rightful possession beyond the time allowed to complete a location.[1]

§ 235. Possession for the purpose of making a location. It would seem to follow from the foregoing rule that one in possession of land peaceably, prospecting the same, and seeking in good faith to establish a mining claim, will be protected in his possession for a reasonable time. Where there is a statutory provision fixing the time within which to complete the location by marking its boundaries, he will be allowed the full statutory period to complete such location, during all of which time his possession will be protected. A lawful possession for the purpose of making a location in compliance with the law is, *pro tanto*, a reservation. But

[1] Belk v. Meagher, 104 U. S. 284; Eilers v. Boatman, 111 U. S. 356; Faxon v. Barnard, 2 McCrary, 44, 4 Fed. Rep. 702; Garthe v. Hart, 73 Cal. 541, 15 Pac. Rep. 93; Sweet v. Webber, 7 Colo. 443, 4 Pac. Rep. 752; Omar v. Soper, 11 Colo. 360, 18 Pac. Rep. 443; Phenix M. & M. Co. v. Lawrence, 55 Cal. 143; Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 25; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. Rep. 280; McKinstry v. Clark, 4 Mont. 295, 1 Pac. Rep. 759; Gleason v. Martin White M. Co., 13 Nev. 442; DuPratt v. James, 65 Cal. 555, 4 Pac. Rep. 553; Lalande v. McDonald, 2 Idaho, 283, 13 Pac. Rep. 347; Eilers v. Boatman, 3 Utah, 159.

this cannot be said of any other manner of possession. It is incumbent upon the locator, however, as we have seen,[1] to exercise the utmost diligence and good faith. If he has rights he must assert them within the lines laid down by congress and the local laws, if there be any, governing and controlling the acquisition of mining ground. He will not, by mere possession, be permitted to exclude those who will in good faith develop the mineral resources of the country. And while there were many decisions in California, prior to the enactment of the federal statute, as noted in the two last preceding sections, which supported and protected actual occupants and possessors of mining claims who did not comply strictly with the rules, a careful examination of these cases will disclose that there was generally an actual, notorious and open possession within well-defined boundaries, which, under the familiar principle controlling the possession and ownership of real property, that no man seeking to acquire a piece of real estate may shut his eyes and ignore possession actually held by another, but must, at his peril, inquire into the circumstances and extent of that possession, was sufficient to entitle the possessor to hold the ground in question. The supreme court of Oregon has gone somewhat to the extreme, and held that, in the absence of any local rule or custom, a locator is not entitled to any time to explore his claim before defining and marking its boundaries.[2]

The weight of authority as well as reason is against this proposition, and the general rule is, as previously stated,[3] that, in the absence of local rule or custom, the discoverer and would-be locator is entitled to a reasonable time, to be determined by all the circumstances of the case, within which to perform the necessary acts to establish his location, namely, the discovery of mineral and the marking of his location upon the ground with reasonable accuracy ac-

[1] *Ante*, §§ 233, 234.

[2] Patterson v. Tarbell, 26 Oreg. 29, 37 Pac. Rep. 76.

[3] *Ante*, § 234.

cording to the course or strike of his vein as he determines it.[1] We do not wish to be understood by this, however, as undertaking to lay down the rule that a prospector who fails to follow up his discovery of mineral by any effort toward completing the statutory location of a mining claim will be permitted, at any considerable time thereafter, to assert any claim as against intervening rights.[2]

§ 236. **Summary of naked possession and its effect as a reservation.**—It will thus be seen that by some of the earlier decisions it was held that one in possession of the public domain of the United States was deemed rightfully in possession,[3] and in California and other western states this possessory right was recognized by statute. Following the common-law principle, which recognized the sacredness of the possession of real property, the courts generally upheld the possession against one who sought to invade it even for the purpose of making a mining location.[4] But by later decisions it was held, and this we take it as the rule to-day, that a mere squatter upon the public domain had not the right to maintain possession against one peaceably seeking to effect the location of a mining claim in a lawful way upon the public lands of the United States.[5] Whence it follows that whatever may have been considered the rule heretofore, it cannot now be said that mere naked possession, without any attempt to comply with any of the laws of the United States, will reserve the land possessed from location,

[1] Marshall v. Harney Peak T. M. & M. Co., 1 S. Dak. 350, 47 N. W. Rep. 290; Erhardt v. Boaro, 113 U. S. 527; Murley v. Ennis, 2 Colo. 300; Patterson v. Hitchcock, 3 Colo. 533; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. Rep. 401. See also Gleason v. Martin White M. Co., 13 Nev. 459; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[2] See Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. Rep. 206; O'Reilly v. Campbell, 116 U. S. 418, 29 L. ed. 669; Roberts v. Wilson, 1 Utah, 292.

[3] Hughes v. Devlin, 23 Cal. 501; Lentz v. Victor, 17 Cal. 271; Fitzgerald v. Urton, 5 Cal. 308. See Gillett v. Gafney, 3 Colo. 358; Gold Hill Q. M. Co. v. Ish, 5 Oreg. 106.

[4] Lentz v. Victor, *supra*.

[5] Horswell v. Ruiz, 67 Cal. 111, 7 Pac. Rep. 197.

even for an instant. But a contrary rule applies when one is in possession exploring the ground with the *bona fide* intention of searching for mineral, and, if found, to make a location. As to all such the rule is that they are protected in their possession for a reasonable time, for the purpose of making a location, and where there is a statute allowing a fixed time in which to complete a location, they are entitled to all that time.[1]

§ 237. The statutory tunnel as a reservation.— We come now to the most striking reservation which congress has enacted with reference to mineral lands, and it may now be said to be settled that a statutory tunnel, duly located under the law,[2] and which is prosecuted with diligence thereafter, creates a reservation in favor of the locator as to all veins or lodes, no matter which way they dip, which may be encountered by said tunnel, at any point within three thousand feet of the face thereof;[3] and that the reservation is of such an extent along the strike of any such lode that the tunnel claimant may claim any fifteen hundred feet of the lode he may choose to claim so long as one end of it crosses his tunnel; that is to say, he may claim fifteen hundred feet of the lode, measured from either side of his tunnel, in the opposite direction.

Unquestionably, the policy of this legislation is a two-sided proposition. On the one hand, is the question of properly compensating the miner for running a blind tunnel, as it is called, for the discovery and development of unknown and undiscovered veins or lodes; that it was granted upon the theory, seldom a fact in experience, that veins or lodes preserve approximately a perpendicular position in their descent into the earth, seems indisputable, whereas in experience they are found upon every conceivable angle, from the vertical to the horizontal; and it is easy to see that this

[1] Erhardt v. Boaro, 113 U. S. 527.
[2] R. S. U. S., § 2323.
[3] Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108, 42 L. ed. 96; Campbell v. Ellet, 167 U. S. 116, 42 L. ed. 101.

legislation may authorize the claiming of a vein running at right angles with the tunnel, dipping towards the tunnel, and having its apex many miles away. On the other hand, this reservation presents the serious evil, amounting almost to a monopoly in the case suggested in the last portion of the last sentence, of reserving a consequent extensive area of land. But whatever the evil, if any, the remedy is only with the legislative power. As to the tunnel itself, and the various rights of the locator, see the chapter on that subject.[1]

[1] See *post*, Part VI, ch. II.

PART V.

LOCATION AS A MODE OF ACQUIRING TITLE — OF THE ESSENTIAL QUALIFICATIONS TO ACQUIRE PUBLIC MINERAL LANDS IN THE UNITED STATES AND ELSEWHERE, AND HEREIN OF INQUEST OF OFFICE.

CHAPTER I.

DEFINES CITIZENS OF THE UNITED STATES, AND THE RIGHTS OF THOSE WHO HAVE DECLARED THEIR INTENTION TO BECOME SUCH, AND OF LOCATIONS MADE BY THEM AND BY ALIENS.

§ 241. Citizenship defined.
242. Of the different kinds of citizens — Native-born — Naturalized — Many definitions.
243. Born or natural citizens — Constitutional and statutory definitions.
244. Alien parents — Children of, born in the United States — Chinese children.
245. Indians held not to be citizens — Corrected by legislative authority.
246. Interpretation of phrase "under the jurisdiction thereof."
247. Of the different modes of naturalization.
248. Purposes of the foregoing — Who may locate mineral lands — Citizens of the United States — Purposes of the statute.
249. Qualifications elsewhere — Canada and Canadian provinces.

§ 241. Citizenship defined.— Citizenship is said to be the state of being vested with the rights and privileges of being a citizen,[1] and by a leading authority a citizen is thus defined: "A person, native or naturalized, who has the priv-

[1] 6 Am. & Eng. Encyc. Law (2d ed.), p. 15, citing Webster's Dict.; Century Dict.; Abrigo v. State, 29 Tex. App. 149; 3 Am. & Eng. Encyc. Law (1st ed.), 242.

ilege of voting for a public officer, and who is qualified to fill offices in the gift of the people; also, any native-born or naturalized citizen, of either sex, who is entitled to full protection in the exercise and enjoyment of the so-called private rights."[1]

There are many other definitions of citizenship, but the purposes of this work do not require nice distinctions or elaborate reproductions. One more will suffice: "A citizen is one who owes to the government allegiance, service and money by way of taxation, and to whom the state, in turn, grants and guarantees liberty of person, and of conscience, and the right of acquiring and possessing property, of marriage and social relations, of suit and defense, and security in person, estate and reputation."[2]

§ 242. Of the different kinds of citizens — Native-born — Naturalized — Many definitions.— Citizenship, under this branch of the law, is again divided into, first, native or natural-born citizens, and second, naturalized citizens. Until the adoption of the fourteenth amendment to the constitution of the United States there was no constitutional definition of the term "citizen," although there were several definitions by the courts. In the succeeding sections we shall examine this question at some length, for the reason that the question more frequently arises in litigation under the mining law than perhaps any other branch of the law; and first—

§ 243. Born or natural citizens — Constitutional and statutory definitions.— All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.[3] A natural-born citizen is one who is born in the United States.[4] One born in a foreign country is a

[1] Webster's Dict., tit. "Citizen."

[2] 8 Am. & Eng. Encyc. Law (1st ed.), p. 242; Amy v. Smith, 1 Litt. (Ky.) 332.

[3] Const. of U. S., art. XIV, sec. 1, 14th amendment. See also United States v. Cruikshanks, 92 U. S. 542; Slaughter-House Cases, 16 Wall. (83 U. S.) 74, 21 L. ed. 394.

[4] Lynch v. Clark, 4 Sandf. Ch.

citizen of the United States if, at the time of his birth, his father was a citizen.[1] To the last observation should be added the statement, we think, that, in order to fully preserve his citizenship, the infant born abroad, whose father was a citizen, must either have returned and taken up his residence within the United States during his minority, or he should return within a reasonable time after his majority and declare his allegiance and claim his citizenship, by assuming and performing the acts of a citizen.

§ 244. Alien parents — Children of, born in the United States — Chinese children. — The objection on the Pacific coast to Chinese immigration and to according to Chinese or the Mongolian race the rights of citizenship, or any other rights for that matter, has engendered a stubborn racial fight which has extended itself naturally to Chinese children born in the United States. Lack of space and the purposes of this work forbid a full examination of all the cases, even if a better understanding of the subject could in that way be obtained. We shall content ourselves, therefore, with the examination of a leading case and those which have followed it. In this case the petitioner belonged to the Chinese race; was born in California in 1870; in 1876 he went to China and returned to San Francisco in 1884 and sought to land, claiming he was a natural-born citizen of the United States; his parents resided in California, and had resided there twenty years, during all which time they had been subject to the commands of the Chinese government; his father sent the son to China with the intention of the son returning; his father was not in this country in any diplomatic capacity under the Chinese government. Petitioner had no certificate as required by act of congress. Field, justice, with whom concurred Sawyer, circuit justice,

584; In re Look Ting Sing, 21 Fed. Rep. 905, 6 Am. & Eng. Encyc. Law (2d ed.), p. 17; Ex parte Ching King, 35 Fed. Rep. 354; In re Wong Kim Ark, 71 Fed. Rep. 382; Gee Fook Sing v. United States, 49 Fed. Rep. 146.

[1] Old Town v. Bangor, 58 Me. 353.

and Sabin and Hoffman, district judges, was of the opinion that the words in the fourteenth amendment, "subject to the jurisdiction thereof," except as applied to Africans and their descendants, was that birth within the United States was of itself citizenship. He decides that a Chinese born in the United States of alien parents, and who resides therein and is not engaged in any diplomatic official capacity under the Chinese government, is a citizen of the United States. And he concludes: "No citizen can be excluded from this country except as punishment for crime." [1]

We think this is logical and conclusive and a correct exposition of the law as enunciated by the best considered cases. Were it not that some courts have taken a somewhat different view of the law from very similar facts, nothing more were necessary to be said. These cases will be examined, however, and an attempt will be made to reconcile them.

§ 245. Indians held not to be citizens — Corrected by legislative authority.— In some of the earlier cases in the federal courts it was decided that Indians born within the territory of the United States were nevertheless not citizens of the United States, the reason assigned being that the Indian tribes were independent political communities, in one case,[2] and in another, because not born subject to the jurisdiction of the United States.[3] Yet in other cases it was held that they were not foreign citizens;[4] and while the question may be said to be perplexing,[5] and while the supreme court

[1] Re Look Tin Sing, 21 Fed. Rep. 905; Lynch v. Clark, 4 Sandf. Ch. 584; Re Wong Kim Ark, 71 Fed. Rep. 382. See also Boyd v. Nebraska, 143 U. S. 135.

[2] McKay v. Campbell, 2 Sawy. 118, 16 Fed. Cas. 161, No. 8840.

[3] United States v. Osborne, 6 Sawy. 406, 2 Fed. Rep. 58.

[4] Mackey v. Cox, 18 How. (59 U. S.) 100, 104, per McLean, J.; Worcester v. Georgia, 6 Pet. (31 U. S.) 515. See also Karrahoo v. Adams, 1 Dill. 344, 14 Fed. Cas. 134, No. 7614.

[5] United States v. Yellow Sun, Fed. Cas. No. 16780, 28 Fed. Cas., p. 800; s. c. *sub nom.* United States v. Sa-Coo-Da-Cot, 1 Dill. 271, 27 Fed. Cas. 923, No. 16212; McCracken v. Todd, 1 Kan. 148; Hunt v. State, 4 Kan. 60.

of the United States has held that even an Indian who had severed his connection with his tribe and taken up his residence in a state was not a citizen of that state,[1] the reasoning of these cases is not at all satisfactory, and, in view of the decisions upon the Chinese question, somewhat obscure. Since a Chinaman born in this country, under the Chinese legation let us say, becomes a citizen by remaining here twenty-one years and claiming citizenship after his majority — and as to the correctness of this no lawyer will doubt,— it is difficult to see why an Indian, who severs his tribal relations, stands on a different footing from a Chinaman, nor why the jurisdiction is lacking in the one case any more than in the other. That the legislative power was not satisfied with the construction placed upon the law by the courts is evident from the following declaration: "And every Indian born within the territorial limits of the United States to whom allotment shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States."[2] It would seem, therefore, as the law now stands, that an Indian who separates himself from his tribe and takes up his residence among the whites, independent of his tribe, as did John Elk,[3] may be considered as a citizen, and to that extent the law as laid down in the last mentioned case is repealed by the act of congress.

§ 246. Interpretation of phrase "under the jurisdiction thereof."— Interpreting the fourteenth amendment to the constitution of the United States, this phrase has been provocative of dispute and difficult of solution. Since the framers of the constitution had under consideration a

[1] Elk v. Wilkins, 112 U. S. 94.
[2] Act of Feb. 8, 1887, 24 Stat. at L, § 6.
[3] Elk v. Wilkins, *supra*.

388; 1 Supp. R. S. U. S., pp. 534–536.

definition of the term "citizenship" in all its features, and the relation of the citizen to the government, its relation to him and the corresponding and correlative rights and duties, it would seem that this phrase is entitled to much larger and more extended meaning than has been accorded to it in any of the adjudged cases on the subject of citizenship.

Why is the child born on foreign soil under the protection of the flag of the country, his father being a citizen, himself a citizen? Is it not because he is, in contemplation of law, born "under the jurisdiction thereof," and consequently a citizen of the United States?[1] It is difficult to understand how it can be said, with any degree of propriety, that a Chinese child born in the United States of Chinese parents is capable of becoming a citizen, and possibly (the question is wholly immaterial) only temporarily residing here,[2] while the Indian born in this country, though it be true that he has wholly severed his tribal relations, can be held not to be a citizen.[3] The language of the constitution is: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This line of thought must have prompted from Justice Field these words: "They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive."[4]

It is quite true that the primary purpose of this amendment was the erection of the African race into the *status* of citizenship, and it is likewise true that congress had pro-

[1] Old Town v. Bangor, 58 Me. 353.

[2] Re Look Tin Sing, 21 Fed. Rep. 905.

[3] Elk v. Wilkins, 112 U. S. 94.

[4] See Look Tin Sing Case, *supra*. See also cases cited *ante*, § 244.

vided by statute earlier in date than the constitution that children of citizens born abroad were deemed to be citizens.[1] But it is a fundamental principle of constitutional construction that a constitutional provision will not be limited alone to the particular evil intended to be remedied if it will reach, by its terms, other and independent cases, and this principle was distinctly recognized by the supreme court of the United States in the Slaughter-House Cases.[2] The conclusions, therefore, deducible from the law at the present time are, first, that any person born in the United States, including Indians who sever their tribal relations, excepting, of course, the children of ambassadors and other representatives of foreign governments who return to their own country, is a citizen of the United States; second, that any child born on an American ship, or on foreign soil, whose parents are at the time citizens of the United States, and who returns to the United States during its minority, or within a reasonable time after attaining its majority, is a citizen of the United States; third, all persons are citizens who become naturalized as such in any of the ways authorized by law, which will be hereafter considered.

§ 247. Of the different modes of naturalization.— Naturalization is accomplished in two ways: individually, by proceedings under the naturalization acts, either in person or through the act of the parent, the subject being under the age of twenty-one years; or collectively, as by force of a treaty by which foreign territory is acquired.[3] Individual naturalization is accomplished in three ways: first, by one's declaring his intention or serving in the army in lieu of such declaration,[4] and after residing in the United States five

[1] Act to secure the right of citizenship to children of citizens of the United States born out of the limits thereof, approved February 10, 1855, 10 Stat. at L. 604; R. S. U. S., § 1993.

[2] Slaughter-House Cases, 16 Wall. (83 U. S.) 36; R. S. U. S., § 1992.

[3] Boyd v. Nebraska, 143 U. S. 135, Book 36, L. ed. 103.

[4] Act of July 17, 1862, 12 Stat. at L. 597; R. S. U. S., § 2166; Com'r McFarland to Watertown (Dak.) Office, 2 L. D. 195; Smith v. United States, 16 L. D. 352; R. S. U. S., § 2365.

years, being regularly admitted in open court; second, in the case of an alien coming to this country before he is eighteen years old, he may dispense with the declaration and become naturalized in open court at any time after arriving at the age of twenty-one years;[1] third, children of parents who have been duly naturalized, under any law of the United States, before such children attain their majority.[2] In cases where new territory is admitted by treaty, as was the case of the Louisiana purchase, the Florida purchase, the admission into the Union of Texas, the Mexican purchase, and the treaty of Guadalupe-Hidalgo, all inhabitants of the territory so acquired become citizens.[3] In this case all of the authorities on this subject are carefully collected and discussed, and for a further discussion and examination of the subject the reader is referred thereto. That case, however, did not turn on the collective naturalization, but upon the fact that the father of Boyd had once declared his intention to become a citizen, and upon information and belief Boyd alleged that he had completed his citizenship and that the record was lost. The fact being well pleaded was held on demurrer to be sufficient, so that much of the discussion, while interesting and instructive, was not necessary to the decision of the case.

§ 248. Purposes of the foregoing — Who may locate mineral lands — Citizens of the United States — Purposes of the statute.— The statute provides that the mineral deposits in the public lands shall be open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such citizens.[4] To those familiar with the history of the times and with the evil the statute was intended to correct, namely, that of

[1] R. S. U. S., § 2167.
[2] R. S. U. S., § 2172.
[3] Boyd v. Nebraska, *supra*.
[4] Act of May 10, 1872, July 4, 1866, R. S. U. S., §§ 2319 *et seq.*; Providence G. M. Co. v. Burke (Ariz.), 57 Pac. Rep. 641.

alien acquisition and ownership of mineral lands, the object of this statute is perfectly plain. It is doubtless equally true that to such men as Senator Wm. M. Stewart and Judge Wm. H. Beatty, who were instrumental in securing its passage and explaining the necessity for such legislation, the construction placed upon the statute in later years by the supreme court of the United States, by some of the federal courts and by the Colorado supreme court has been somewhat disappointing.[1] Be that as it may, the reading of the statute discloses the purpose of congress to correct the evil of alien claim and ownership of mines. The language is plain, and, except for the failure to provide any means of escheat, or denial of the rights acquired, by some proceeding in the nature of inquest of office other than the denial of patent, the means employed were adequate.[2] While the decisions in nearly all the mining states are uniform in saying that citizenship is an essential qualification to take and hold mineral land,[3] there has been considerable contrariety of opinion as to when, where and how that question could be properly raised. We will discuss these matters in the succeeding sections of this work.[4]

§ 249. Qualifications elsewhere — Canada and Canadian provinces. — In the preceding pages of this work we have noted that the holding of a free miner's certificate is essential in some portions of British North America in order to acquire title or right of possession to mineral lands. No

[1] Manuel v. Wulff, 152 U. S. 505; Billings v. Aspen M. & S. Co., 2 C. C. A. 252, 51 Fed. Rep. 338; on rehearing, 3 C. C. A. 69, 52 Fed. Rep. 250; Justice M. Co. v. Lee, 21 Colo. 260, 40 Pac. Rep. 444.

[2] See authorities in the last preceding note.

[3] North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522; Chapman v. Toy Long, 4 Sawy. 28, 5 Fed. Cas. 497, No. 2610; Lee Doon v. Tesh, 68 Cal. 43; Ferguson v. Neville, 61 Cal. 356; Anthony v. Jillson, 83 Cal. 296; Bohanon v. Howe, 2 Idaho, 417, 17 Pac. Rep. 583; Rosenthal v. Ives, 2 Idaho, 244, 12 Pac. Rep. 904; Tibbitts v. Ah Tong, 4 Mont. 536; Ducie v. Ford, 8 Mont. 233; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Strickly v. Hill, 22 Utah, 257, 62 Pac. Rep. 898.

[4] See *post*, this part, ch. III.

other discrimination is made or qualification anywhere required, and any person or corporation, upon payment of a fee, may acquire the free miner's certificate. A list of the statutory provisions and orders is subjoined in the note.[1]

In Mexico, any person or corporation, upon satisfying the department of financial ability to properly open a mine, may acquire a concession.

[1] *Ontario:* Sec. 45, R. S. Ontario, 1897, ch. 36, as amended 61 Vict., ch. 2, and 62 Vict., ch. 10.

Nova Scotia: Sec. 85, Acts of 1892, which grants to any person the right to a miner's license upon compliance with the terms of the act.

Quebec and New Brunswick: Quebec Act of 1892, sec. 1422; New Brunswick General Min. Act, April 16, 1891, § 8, in both of which aliens are given the same rights and privileges as British subjects, upon compliance with the terms of the statute.

Yukon: Regulations governing placer mining in the provisional district of Yukon, approved January 18, 1896, § 1, where a prospector is required to procure a free miner's license.

Northwest Territories: Order in Council, approved July 29, 1897, governing the issuance of leases to dredge for minerals in the submerged beds of rivers in Manitoba and the Northwest Territories. This act contains the same provision relative to free miners' certificates that controls in the district of Yukon.

Manitoba: Mines Act 1897, § 21, grants license to any one on payment of the required fee.

British Columbia: Placer Mining Act, 1891, ch. 26, as amended in 1898 and 1899, § 8. This section provides that every person who is not less than eighteen years of age and a British subject shall be entitled to all the rights and privileges of a free miner, and shall be considered a free miner as long as his certificate remains in force. These free miners' certificates are not transferable.

CHAPTER II.

CERTAIN CORPORATIONS CITIZENS SUB MODO, AND HEREIN OF PROOF OF CITIZENSHIP.

§ 253. Early doubt as to corporations' rights.
254. Courts decide in favor of locations by corporations.
255. Proof of citizenship, and herein of presumption as to citizenship.
256. Proof of citizenship continued — Extreme cases — Acts of citizenship — Trustees.

§ 253. Early doubts as to corporations' rights.— The statute[1] provides that the mineral lands are open to occupation and purchase by citizens of the United States and those who have declared their intention to become such, and does not restrict to individuals, but is permissive of being exercised by any combination of persons answering that description, and this appears to be the plain contemplation of the law. Since there is no limitation upon the number of persons that may locate a mining claim, and since corporations are but aggregations of persons,[2] it follows that a mining claim may be located by a corporation. The law provides for corporations owning and securing patent to mining claims in the same manner that individuals or firms secure title.[3] But notwithstanding this provision it was doubted for many years whether a corporation could make a valid location, and in an early case[4] the defendants requested the court to charge the jury that the plaintiff, being a corporation, was not entitled to the privilege of making a mineral location, and the court so charged. The supreme court of Idaho dodged the question by using this language: "Without deciding whether this was error or not, we can safely

[1] R. S. U. S., § 2319.

[2] McKinley v. Wheeler, 130 U. S. 630.

[3] R. S. U. S., § 2333.

[4] Stemwinder M. Co. v. Emma and Last Chance M. Co. (Idaho), 21 Pac. Rep. 1040.

say that it was not such error as would justify a reversal." This case was appealed to the supreme court of the United States and was affirmed by a divided court, no opinion being written.[1]

§ 254. Courts decide in favor of locations by corporations.— In a later case, however, the supreme court of the United States, in reviewing many of the decisions on the question of citizenship,[2] decides squarely the question that locations may be lawfully made by corporations, but in such case the corporation must be treated as a single entity, locating its claim in its corporate name; moreover, to entitle it to locate mining claims, it must be chartered by some one of the states or territories of the United States.[3]

Mr. Justice Field ably reviews the situation in this language: "It will be observed that no prohibition is here made against citizens of the United States uniting together for the occupation and purchase of public lands containing 'valuable mineral deposits.' Nothing is said of partnerships or associations or corporations; it is to citizens that the privilege is granted, and that they may unite themselves in such modes as in all other pursuits was, as a matter of course, well know to those who framed, as well as to those who passed, the statute. There was no occasion for special reference to the subject to give sanction to these modes of uniting means to explore for mineral deposits, and to develop them when discovered. . . ." And after reciting the manner in which corporations are formed, he continues, speaking of corporations: "They are little more than aggregations of individuals, united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution. We think, therefore, that it would be a

[1] Stem Winder M. Co. v. Emma and Last Chance M. Co., 149 U. S. (not officially reported), L. ed. 37, p. 941.

[2] Bank of United States v. Deveaux, 9 U. S. (5 Cranch), 61, 3 L. ed. 38. See also Muller v. Dows, 94 U. S. 455.

[3] McKinley v. Wheeler, 130 U. S. 630; Dahl v. Mont. Copper Co., 132 U. S. 264; Thomas v. Chisholm, 18 Colo. 105, 21 Pac. Rep. 1019.

forced construction of the language of the section in question, if, because no special reference is made to corporations, a resort to that mode of uniting interests by different citizens was to be deemed prohibited. There is nothing in the nature of the grant or privilege conferred which would impose such a limitation. It is in that respect unlike grants of land for homestead or settlement, indicating in such cases that the grant is intended only for individual citizens." We may add, too, that it is unlike those grants in other respects, for it permits sales to any person or corporation who may buy, limited only, under the law of March 1887, to citizens of the United States within the territories. But in the case above, the court, after citing the various sections of the statute, including sections 2321 and 2325, concludes as follows: "We are of opinion that some rule of construction should control in this case, and that, in accordance with it, section 2319 of the Revised Statutes must be held not to preclude a private corporation under the law of a state, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States. There may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer. It may perhaps be treated as one person, entitled to locate only to the extent permitted to a single individual."[1]

It will thus be seen that Judge Field hinged that case somewhat — rather too much, we think — upon the question of stockholders being citizens. This would involve the further question in all cases of proof of citizenship of individual stockholders, a problem fraught with endless difficulty, and a hardship which the law-making power never designed. We think the presumption of citizenship from the fact of incorporation within one of the states or territories may safely be made, and if necessary this might be extended to a conclusive presumption.[2]

[1] McKinley v. Wheeler, 130 U. S. 630, 32 L. ed. 1048.

[2] Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 100; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207. See Proof of Citizenship, *post*, next section.

§ 255. Proof of citizenship, and herein of presumption as to citizenship.— Following the general doctrine of presumptions, citizenship will be presumed in all cases where not drawn squarely in question in one of the modes pointed out or permitted by statute;[1] and this presumption is so strong that, if not conclusive, it will make out a *prima facie* case sufficient to support a location,[2] and would be conclusive in all cases except upon application for patent or in adverse suits.[3] In proceedings in the land office the statute provides that "proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a copy of its charter or certificate of incorporation."[4] This section is followed literally in all proceedings in the land office.[5] In the courts, however, while the affidavit is *prima facie* evidence of citizenship and so held, it is well settled that it is not the only way of proving citizenship, but that it may be proved in the same way as any other fact,[6] and is a question of fact for the jury;[7] and it has been held that the oath attached to a certified copy of

[1] Jantzen v. Arizona Copper Co. (Ariz.), 20 Pac. Rep. 98; Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. Rep. 153; Wandering Boy Lode, 2 C. L. O. 2; Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 190.

[2] Doe v. Waterloo M. Co., *supra;* Jantzen v. Arizona Copper Co., *supra;* Muller v. Dows, 94 U. S. 444.

[3] See *post*, Part X, ch. III.

[4] R. S. U. S., § 2321; Act of May 10, 1872, 17 Stat. at L., p. 94.

[5] Circular of Oct. 31, 1881, secs. 78-81; Com'r Williamson to Stockton Office, Copp's Min. Lands, p. 194; Silver King M. Co., 20 L. D. 116; Rose No. 1 and 2 Lodes, 22 L. D. 86; Alta Mill Site, 8 L. D. 195.

[6] Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182; Strickly v. Hill (Utah), 62 Pac. Rep. 893. See next succeeding section; People v. Pease, 29 N. Y. 45; Coxe v. Gulick, 10 N. J. L. 328.

[7] Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., *supra.*

the location notice was sufficient proof of citizenship.[1] This, of course, in the land office and in land-office proceedings; but ordinarily in court, proof should be made the same as of any other fact.

§ 256. **Proof of citizenship continued—Extreme cases—Acts of citizenship — Trustees.**— It is sometimes difficult or impossible to make direct proof of citizenship, for the reason that the subject is dead, or, as is often the case in mining regions, where the miners are more or less of a nomadic character, and therefore the residence of the subject is unknown and cannot, after due diligence, be ascertained, the fact as to whether he is a native or naturalized citizen, or a citizen at all, cannot be proved by direct proof nor by any record. In such cases the land office has permitted proof to be made that the subject of the inquiry has voted or registered to vote, thus performing the acts of citizenship;[2] and the courts, recognizing the impossibility of making direct proof of citizenship in such cases, have admitted secondary evidence of citizenship, to the effect that the person whose citizenship is in question has voted or performed other acts of citizenship,[3] and this not only in mining cases, but in many others.[4] The reason of this rule is apparent and its correctness cannot be assailed.

Where citizenship is claimed through the parent, proof of

[1] Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. Rep. 153. Compare Frick v. Gold Hill M. Co., 8 Mont. 298, 20 Pac. Rep. 807.

[2] S. P. R. R. Co. v. Brown, 9 L. D. 173; Jones v. S. P. R. R. Co., 19 L. D. 270; Com'r Armstrong to Eureka (Nevada) Office, February 10, 1880, Copp's Min. Lands, 267.

[3] Wood v. Aspen M. Co., 36 Fed. Rep. 25; Strickly v. Hill (Utah), 62 Pac. Rep. 893. See also Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522.

[4] 6 Am. & Eng. Encyc. of Law (2d ed.), p. 26, note 1, citing (*q. v.*) Kreitz v. Behrenmeyer, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. Rep, 232; Hogan v. Kurtz, 94 U. S. 773; Boyd v. Nebraska, 143 U. S. 135; Sasportas v. De La Motta, 10 Rich. Eq. (S. C.) 38; Malle v. Fenwick, 4 Rand. (Va.) 585.

the parent's citizenship must of course be made.[1] But in applications for patent, and perhaps in other cases, as the law now stands, proof of the citizenship of the locators or intermediate owners becomes unnecessary, that of the applicant being the only matter in question.[2] It is likewise a rule of the land department, and correct, we think, that where application for patent is made by a trustee the citizenship of the beneficiary must be shown;[3] and this rule has been extended to a trustee for creditors;[4] but its correctness may be doubted in view of the fact that the trustee in such case holds the legal title, and his citizenship should therefore be the material question, and for the further reason that the creditors take the proceeds of the property and not its *corpus*.

In Indian territory are found provisions protecting any citizen of the Choctaw nation in the discovery of any mine.[5] In such case it was held that citizens of the Choctaw nation are entitled to the benefit of such discovery by one in partnership with such citizen or in his employ.[6]

[1] Com'r Drummond to Central City (Colo.) Office, August 18, 1872, Copp's Min. Lands, p. 88. As to mode of making proof by secondary evidence, see People v. McNally, 59 How. Pr. (N. Y.) 500.

[2] Cash Lode, 1 C. L. O. 98.

[3] Circular of General Land Office, July 6, 1888, 2 L. D. 725; Capricorn Placer, 10 L. D. 641. See also Clark, Heltman & Consaul's Digest, p. 197.

[4] Commissioner to Chas. W. O'Neill, December 7, 1891; Clark et al. Digest, p. 177, § 34.

[5] McCurtain v. Grady (Ind. Ter. App.), 38 S. W. Rep. 65.

[6] Ibid.

CHAPTER III.

LOCATION BY ALIENS — STATUS AND RESULT OF.

§ 259. Preliminary observations — Power of congress over territories — Alien land laws.
260. Effect of location by alien — Earlier decisions held it void — Later to contrary.
261. The contrary view and reasoning thereon.
262. Other *dicta* considered — *Dictum* defined — Citizenship early held as a condition.
263. Modification of early decisions — How defect in citizenship may be cured.

§ 259. Preliminary observations — Power of congress over territories — Alien land laws.— We have already noticed in some of the preceding sections of this work something with reference to the sovereign power of the congress of the United States over the territories and property belonging to the United States.[1] This power is everywhere recognized and has been repeatedly declared by the court,[2] and it is therefore unnecessary to consider it at further length here.

In some of the states, notably Idaho,[3] Nevada[4] and Oregon,[5] there are statutory or constitutional provisions forbidding Chinese aliens from acquiring property in those states; but so far as we have been able to ascertain, there are no other statutory provisions except in some of the states, not necessary to mention here, which in casting descent upon aliens require them to appear and claim the estate within a specified time.

The objection to alien ownership of land, however, be-

[1] *Ante*, § 112.

[2] National Bank v. Yankton, 101 U. S. 129 and cases cited.

[3] Idaho Stats. 1890, 1891, p. 118; Act of March 2, 1891, sec. 1.

[4] R. S. of Nevada, 1900, § 2725.

[5] Const. of Oregon, art. I, sec. 31.

came very pronounced during the decade commencing with the year 1880, resulting in the enactment by congress of legislation forbidding it, the first two sections of which read as follows:

"Sec. 1. That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some state or territory of the United States, to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created; provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force and no longer.

"Sec. 2. That no corporation or association, more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the territories of the United States or of the District of Columbia." [1]

It is perhaps needless to remark that this applies only to the territories; as to whether it applies to Alaska there has been no decision of any court to our knowledge; but no good reason occurs to us, notwithstanding an able argument of Mr. Lindley,[2] why it should not be so extended. Additional weight is due to this observation at the present time because Alaska has been clothed with a territorial form of government.

[1] Act of March 3, 1887, 24 Stat. at L. 476; 1 Supp. R. S. U. S., p. 556.

[2] Lindl. on Mines, sec. 248, pp. 298, 299, 300.

§ 260. Effect of location by alien — Early decisions held it void — Later to contrary. — By some of the early decisions it was seriously questioned what would be the result if ownership of a mining claim was found, either by location, purchase or descent, in an alien, some of them going so far as to say that the ownership was void as to such alien.[1] Thus in an early case in Nevada the subject was carefully and ably reviewed, and in order to demonstrate the view of the court at that time, we will reproduce excerpts from that decision,[2] interspersed with our own comments thereon. In that case there was doubt of McDonald's citizenship, but that fact became immaterial. The court says: "As to the first point, it is clear that an alien who has never declared his intention to become a citizen is not a qualified locator of mining ground, and he cannot hold a mining claim, either by actual possession or location, against one who connects himself with the government by compliance with the mining law. This much is certain, but it is not so certain that proof of citizenship must be made in order to show a valid location. It may be that the locator, in the absence of any proof, will be presumed to be a citizen."

While, for some purposes, this is true, we think that the proof must be made whenever and wherever the fact is properly called into question, it being a special privilege and a statutory one, and all who claim it must bring themselves squarely within the definition of the statute. Further on in this case, the citizenship of Leonard becoming a material question, he testified on cross-examination that he was not a citizen and had never declared his intention to become such, and the court thereupon decided that the location of the Leonard claim was wholly void, and excluded all evidence in regard to it. The court says this ruling was erro-

[1] Tibbits v. Ah Tong, 4 Mont. 536, 2 Pac. Rep. 759. Compare Territory v. Lee, 2 Mont. 124; Chapman v. Toy Long, 4 Sawy. 28, 5 Fed. Cas. 497, No. 2,610. See also Smith v. Robinson, 1 Mont. 14; Belk v. Meagher, 3 Mont. 79.

[2] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

neous; he had parted with his interest in the premises, and his admissions were not binding on his grantees. The court proceeds: "He said that he was born in New York; that he was taken at a tender age to Ireland, and returned to this country a few years ago. He had been advised that he was not a citizen, and, acting on this advice, had made a declaration . . . of his intention to become a citizen. On this testimony it should have been found that he was a citizen by nativity. But besides this evidence tending to prove that Leonard was a citizen by nativity, besides his declaration of intention, . . . it was proved and admitted that two of Leonard's co-locators (grantors of defendant) were citizens at the date of location. . . . Under the law a single qualified locator may take up fifteen hundred feet of a vein. . . . An association of a dozen or a hundred locators can take up no more. Here were five locators claiming in common no more than any one of them might have taken. . . . By figures placed opposite their respective names, as signed to the notice of location, they indicated the number of undivided feet that each was to own. . . . Suppose, then, Leonard was not capable of making a location. How does that fact render the whole claim void? It is said that Leonard's claim was a fraud upon the law; but admitting that, . . . there is not a particle of evidence tending to show that his co-locators were aware of his disability, or that they were colluding with him in his attempted fraud. They certainly were not guilty, and it would be a harsh rule to make them suffer for the guilt of Leonard. . . . The law in such cases will be sufficiently vindicated by holding that the alien's claim is void. . . . It is not necessary to decide what would become of his claim. It might be open to location by a stranger, or it might have to be distributed among the qualified owners. Counsel for the respondent think it would have to be distributed among the qualified owners unless the whole claim is held void, and assuming that there is no rule of law by which such distribution could be made, they argue that the only alternative

is to declare the claims of all the locators void. We think, however, that there would be no greater difficulty in making the distribution, if it had to be made, than there would be in the case provided for in the mining law where one of the several co-owners refuses to contribute his share of the work necessary to preserve the claim."

The court is correct upon this principle: the void name might be treated as a fictitious one, and, being unnecessary to accomplish anything, treated as surplusage; and under the familiar rule that surplusage will not vitiate, the notice be held sufficient without it. Besides, the usual form of this notice is not to specify in the body the quantity taken by each; and the notice itself is complete without the names, which are only for the purpose of indicating who claims it; and if a disqualified person claims it, it would at worst be null *pro tanto* only. But the trend of later decisions is to refuse to go to this extreme in all cases.

§ 261. The contrary view and reasoning thereon.— In a case in the circuit court of appeals the facts were these: Wood, Fisk and Kirkpatrick discovered and located the Emma mine; Wood died intestate, leaving certain heirs in Canada; Fisk, the surviving partner, advertised him out by a notice which was held insufficient; Wheeler bought out the heirs after buying Fisk's interest, without informing them of the value of the mine; the citizenship of Wood became an important question in the case upon an action filed by his widow to set aside the deed. Judge Shiras in the opinion uses this language: "It would certainly be inequitable to rule that if Wood were living, his co-locators, Fisk and Kirkpatrick, or any one claiming under them, could deprive him of his interest in the mine merely because he was an alien. To hold that, after Wood had expended time, labor and money in prospecting for and locating the mine jointly with them, they could oust him therefrom, or refuse him the right of participating in the proceeds thereof, would be nothing short of legalized robbery. His alienage, if it existed

when the mine was located, would not have the effect of transferring his interest to his co-locators. The United States might, by proper proceedings, have deprived him of the benefits of the location made by him, but Fisk and Kirkpatrick could not avail themselves of the right of escheat belonging to the government. Thus, in Craig v. Leslie it is said: 'Now what is the situation of an alien? He can not only take an interest in lands, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received.'"

The difficulty with this reasoning is that it is giving practical and beneficial effect to a nullification of the statute. The locators when they make a location have the statute staring them in the face, and to say that they can do indirectly what they are forbidden to do directly, and by spending money acquire a right which they cannot otherwise secure, is equivalent to saying that the question of aliens locating or purchasing land in defiance of the statute shall only be measured or limited by the amount of money spent. It may be that the question cannot be properly raised in all cases; but in a proper case, such as upon application for patent, it can be raised; in such case it would not do to say he could save the claim from loss by the expenditure of money. In such case, unless the estate by transfer has come into hands competent to patent it, it must go to those who could patent it, and we see no objection to it going to the qualified co-owners who could patent it.

In the same opinion Judge Shiras, after discussing the several provisions of the statute and the authorities authorizing aliens to succeed to land, says: "It thus appears that if Wood were living and had brought a proceeding for the enforcement of his title and right to an undivided one-third interest in the Emma mine against the present defendants, they could not object thereto, either under the laws of the United States or the state of Colorado, on the ground that he was an alien, that being a privilege reserved to the sovereign

only."[1] This would depend, we think, upon whether patent had in the meantime been issued to qualified persons who could not be reached as trustees.[2]

If the reasoning of the Golden Fleece case is correct, it required no action on the part of anybody. If it were a void act, the breath of life cannot be blown into it. Nor would it require any proceeding to have it declared void. If it were voidable, of course the rule would be different, and the court would be right. The logic of the situation calls it voidable merely. Yet this leaves the pertinent inquiry: Of what use is the requirement of the statute that the locator must be a citizen, if under any circumstances he can acquire a valid title, and still be an alien?

§ 262. Other dicta considered — Dictum defined — Citizenship early held as a condition.— It may well be doubted whether, in collecting and marshaling principles, as becomes the duty of a law writer, there is any such thing as *obiter dicta*. What is held to be *dictum* in one case affords the foundation stones upon which a subsequent case and the decision thereon may be based. Whence it follows that what may be classed, for the purpose of the case itself, as mere *dictum*, becomes in turn the index to the future decisions involving similar principles. For instance, in an early case it was decided by the supreme court of the United States, holding very closely to the principle controlling all these cases, that the right of location upon mineral lands is

[1] Billings v. Aspen M. & S. Co., 51 Fed. Rep. 338, citing Craig v. Leslie, 8 Wheat. 563; Cross v. De Valle, 1 Wall. 1; Osterman v. Baldwin, 6 Wall. 116. See also North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522.

[2] See Black v. Elkhorn M. Co., 49 Fed. Rep. 549, 52 Fed. Rep. 859; affirmed, 163 U. S. 445, where it is decided that the United States, being the sovereign proprietor, may fix the terms and decide the person or persons to whom patent may go, or withhold it altogether. The Colorado court of appeals reached a somewhat different conclusion. Lee v. Justice M. Co., 2 Colo. App. 112, 29 Pac. Rep. 1020. But this was reversed on appeal. Justice M. Co. v. Lee, 21 Colo. 260, 40 Pac. Rep. 444.

a privilege granted by congress, and can only be exercised within the limits prescribed in the grant, and only in the cases, and by the persons, authorized in the descriptive parts of the grant, and that any attempt to go beyond that would be of no avail.[1] There is abundant decision in the early cases, *dictum* much of it, it is true, but nevertheless clearly announcing the principle of law that the spirit and intent of the law confines the right of making locations to citizens and those who have declared their intention to become such.[2] So, it has been held in early cases in state courts, that where the title falls upon an alien it is *per se* an abandonment,[3] but the weight of authority does not support this extreme. Just what disposition would be made of the interest owned by an alien, where the question was properly at issue, has not been determined; but since an applicant for patent must be a citizen, and since, as we have seen, if a portion of the title were held by competent persons, and since a grant by an alien to a citizen would cure the defect, or the declaration by the alien to become a citizen would accomplish the same result, we entertain no doubt that while the land department, or the court, if it should come before the court, would reject the title made by the alien, he could avoid the consequences in the manner we have indicated.

§ 263. Modification of early decisions — How defect in citizenship may be cured.— The extreme positions taken in the early decisions have recently been radically modified along the lines indicated in the last section, following the rule which has obtained in the land office for many years. So that it may now be said to be settled law, that the question of citizenship may be raised, and becomes material, at the time when the applicant seeks to obtain a government

[1] Belk v. Meagher, 104 U. S. 279.

[2] North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522; Tibbits v. Ah Tong, 1 Fed. Rep. 522; Bohanon v. Howe, 17 Pac. Rep. 583; Lee Doon v. Tesh, 8 Pac. Rep. 621.

[3] Tibbits v. Ah Tong, *supra*.

title, and that if satisfied and adjusted as of that date it operates by relation to the time when the first steps were taken by the applicant to acquire title, which in the case of a mining claim would be the day of the location.[1] This being true, a location can now be made by an alien and is not *ipso facto* void, but only voidable; and it may be cured and made good in either of three ways: First, by the locator himself declaring his intention to become a citizen;[2] second, by his grant to a citizen, or to one who had declared his intention to become a citizen, the estate thus being found in qualified hands at the time of the application for patent;[3] and third, by the estate being cast by descent upon a citizen or upon a person who has declared his intention to become such.[4] This leads, of course, to the inquiry where, when and by whom citizenship may be questioned, which we reserve for consideration in the next chapter.

[1] Manuel v. Wulff, 152 U. S. 505; Justice M. Co. v. Lee, 21 Colo. 260, 40 Pac. Rep. 444; Lone Jack M. Co. v. Megginson (C. C. A.), 82 Fed. Rep. 89; Croesus M. Co. v. Colorado M. & M. Co., 19 Fed. Rep. 78; Kempton Mine, 1 C. L. O. 178; Wm. S. Wood, 3 C. L. O. 69; Cash Lode, 1 C. L. O. 97; Ole O. Krogstad, 4 L. D. 564. See also Governeur's Heirs v. Robertson, 11 Wheat. 332; Osterman v. Bulman, 6 Wall. 116; Jackson v. Beach, 1 Johns. Cas. 399; Billings v. Aspen M. & S. Co., 2 C. C. A. 252, 51 Fed. Rep. 338, 3 C. C. A. 69, 52 Fed. Rep. 250; Harvey v. State, 40 Ala. 689; Jackson ex dem. v. Green, 7 Wend. 333; Craig v. Radford, 3 Wheat. 594; Fairfax's Devisee v. Hunter's Lessee, 7 Cranch, 603; Strickly v. Hill (Utah), 62 Pac. Rep. 893; Fritts v. Palmer, 132 U. S. 282.

[2] Manuel v. Wulff, *supra;* Re Krogstad, *supra;* Lone Jack M. Co. v. Megginson, *supra;* Gorman M. Co. v. Alexander, 2 S. D. 557, 51 N. W. Rep. 346.

[3] See authorities in last preceding note; Billings v. Smelting Co., *supra;* Strickly v. Hill, *supra.*

[4] See the reasoning of the court in Manuel v. Wulff, *supra.* See also Wood v. Aspen M. & S. Co., 36 Fed. Rep. 25.

CHAPTER IV.

WHEN BY WHOM AND HOW CITIZENSHIP MAY BE QUESTIONED.

§ 266. Preliminary observations.
267. Sovereign authority — Office found — Controlling principles.
268. Logical conclusion — Inquest of office — Sovereign right.
269. Application for patent is in the nature of inquest of office — Other actions not.

§ 266. Preliminary observations.— Much of the discussion of this question and many of the decisions thereon have been brought about by what we may properly call a premature discussion of this question, the thought being, and it must be admitted there is good ground for it, that citizenship, being a qualification essential to the right to locate and claim mineral lands under the law, was open to question at any time, and under all circumstances, where a location made by an alien should be attacked by a citizen; the early idea being that, while it was admittedly essential that the attacking party should connect himself in some way with the government, it was considered a sufficient connection that he himself, a legally qualified locator, had made a valid location, and the courts in some instances so decided.[1] But more careful thought upon the subject enforced the conclusion that since the alien might, in England, even against the king, and in this country, hold until office found, that right was a sovereign right and could be exercised only by the sovereign, or by one upon whom, for the time being, the sovereign right was bestowed. The elaboration of this principle is reserved for the next section.

[1] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312. See also Tibbits v. Ah Tong, 4 Mont. 536, 2 Pac. Rep. 799; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522; Bohanan v. Howe (Idaho), 17 Pac. Rep. 583; Lee Doon v. Tesh, 8 Pac. Rep. 621, 68 Cal. 43.

§ 267. Sovereign authority — Office found — Controlling principles.— As we have had occasion to remark in the preceding sections of this work, the intention was manifest, and is nowhere disputed by the courts, that by the enactment of the law aliens should be excluded from the right to locate and hold mining claims. The difficulty always encountered has been as to where, under what circumstances and by whom that question could be raised, some of the decisions, as we have seen,[1] holding that it could be raised anywhere and under all circumstances; but this doctrine was overturned when it came to the final test, as we shall have occasion to examine further on in this work,[2] when it was decided that the application for patent and the proceedings thereunder were the only proceedings under the law wherein and whereby the question of citizenship became material, and could be raised by any other than the government. Of course this was a disappointment and a fault in the law, and the courts, while they could not legislate, did the only thing within their power. The later expressions of the United States courts encountered the situation not provided for by the statute, and decided that the alien may hold until office found.[3] In patent proceedings, then, and in no other case under the statute, can the question of citizenship be raised by any other than the government.[4] Other cases have held to the contrary;[5] but in view of the fact that the position and decision of the

[1] *Ante*, §§ 260–266.

[2] *Post*, Part X, ch. II. See also § 269, *post*.

[3] Billings v. Aspen M. & S. Co., 2 C. C. A. 252; on rehearing, 3 C. C. A. 69, 52 Fed. Rep. 250; Manuel v. Wulff, 152 U. S. 505; Little Emily M. & M. Co. v. Couch, C. C. Dist. of Idaho, unreported; Lone Jack M. Co. v. Megginson (C. C. A.), 82 Fed. Rep. 89; Strickly v. Hill (Utah), 62 Pac. Rep. 893.

[4] Manuel v. Wulff, *supra*; Strickly v. Hill, *supra*, and cases cited; Gordon M. Co. v. Alexander, 2 S. D. 557, 51 N. W. Rep. 846.

[5] North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; McFeters v. Pearson, 15 Colo. 201; Anthony v. Jillson, 83 Cal. 296; Thompson v. Spray, 72 Cal. 528; Altoona Q. M. Co. v. Integral Q. M. Co., 45 Pac. Rep. 1047; Moritz v. Lavelle, 77 Cal. 10, 18 Pac. Rep. 803.

supreme court of the United States must be held to be authoritative and controlling in all matters of this kind, the decisions to the contrary must be held as no longer expressing the law.

§ 268. Logical conclusion — Inquest of office — Sovereign right.— This conclusion of the courts, when considered in all its bearings, while not satisfactory to the practitioner in many respects, must be admitted to be the logical deduction to be drawn from the law, in view of the well-settled rule that inquest of office is and always has been a right reserved to the sovereign power, and may not be exercised collaterally by an individual.[1] As was said by the supreme court of the United States, speaking upon this point, and after quoting with approval the reasoning of the supreme court of Montana,[2] but wherein the court reaches a different conclusion, and in the course of its reasoning states the rule as follows: "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law so well established that the reason of the rule is little more than a subject for the antiquary. . . This being so, we are of opinion on this record that, as Alfred Manuel was a citizen, if his location were valid, his claim passed to his grantee, not by operation of law but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question only by the government."[3]

[1] Manuel v. Wulff, 152 U. S. 505, and cases: Billings v. Aspen M. & S. Co., 2 C. C. A. 252; on rehearing, 3 C. C. A. 69, 52 Fed. Rep. 250; Craig v. Leslie, 3 Wheat. 563; Cross v. De Valle, 1 Wall. 1; Taylor v. Benham, 5 How. 232; Craig v. Bradford, 3 Wheat. 594; Lone Jack M. Co. v. Megginson, 82 Fed. Rep. 89, 27 C. C. A. 68; Racouillat v. Sansavain, 32 Cal. 376; Ferguson v. Neville, 61 Cal. 356; People v. Folsom, 5 Cal. 373; Ramires v. Kent, 2 Cal. 558; Merle v. Matthews, 26 Cal. 477; Justice M. Co. v. Lee, 21 Colo. 260, 40 Pac. Rep. 444; Wulff v. Manuel, 9 Mont. 276, 23 Pac. Rep. 723 and cases cited; Gorman M. Co. v. Alexander, 2 S. Dak. 557, 51 N. W. Rep. 346; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 56 Pac. Rep. 300; Bradstreet v. Supervisors of Oneida Co., 13 Wend. 546.

[2] Wulff v. Manuel, *supra*.

[3] Manuel v. Wulff, *supra;* Racouillat v. Sansavain, *supra;* De

In the case just cited by the supreme court, there appears this statement by Mr. Justice Johnson, which, inasmuch as it clearly gives the reason of the rule, we reproduce: "It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. . . . But there is one reason assigned by a very judicious compiler, which, for its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon: . . . 'Every person,' says he, 'is supposed a natural-born subject, that is resident in the kingdom, and that owes a local allegiance to the king, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold."[1] Thus the courts have met the dilemma squarely, and between that of not perpetrating a fraud upon an innocent holder of the legal and equitable title on the one hand, and of declaring the entire proceeding a fraud upon the statute and upon the government, the court chose the former course. It is immaterial that this discloses a defect in the statute; the remedy is with the legislative power.

§ 269. Application for patent is in the nature of inquest of office — Other actions not.— Thus it is that in adverse suits only can the question of citizenship be raised by individuals. It is a material question there, as well as in the land office on application for patent.[2] Such proceedings partake of the nature, *pro hac vice*, of inquest of office;[3] while in actions in ejectment and kindred suits, on the

Merle v. Matthews, *supra;* Taylor v. Benham, *supra;* Fairfax v. Hunter, 7 Cranch 603, 618; People v. Folsom, *supra;* Territory v. Lee, 2 Mont. 124.

[1] Doe ex. dem. Governeur's Heirs v. Robertson, 11 Wheat. 332.

[2] See *post*, § 717.

[3] Id.; Lone Jack M. Co. v. Megginson, 27 C. C. A. 63, 82 Fed. Rep. 89: McFeters v. Pearson, 15 Colo. 201, 24 Pac. Rep. 1076.

other hand, the strength of reason and authority make the question of citizenship collateral and immaterial.[1]

The supreme court of Colorado aptly states this rule as follows: "It is further contended that the complaint is defective for want of necessary averments of citizenship. It is true, in a proceeding to settle adverse claims to mineral lands, the plaintiff must allege and prove that he is a citizen of the United States or that he has declared his intention to become such, in order to obtain the patent; and under the amendment of 1881 the defendant must make like averment and proof in order to succeed on his part. The supreme court of Idaho seems to have extended this doctrine to actions of trespass, though it was a case where the defendants not only denied the title of the plaintiff to the mining claim but also claimed to have located the same themselves.[2] But it seems to us that there is reason for distinguishing in the matter of pleading between proceedings to settle adverse claims to mining property and a civil action for cutting and carrying away timber from such property. The former is a statutory proceeding prescribed by act of congress, the very purpose of which is to settle the title between contesting claimants and thus lay the foundation for the issuance of the government patent. Hence the pleadings must specially conform to that object. The latter, under our procedure, is an ordinary civil action to recover damages from a wrong-doer; injury to the possession is the gist of the

[1] Billings v. Aspen M. & S. Co., 2 C. C. A. 252, 51 Fed. Rep. 338: s. c., 3 C. C. A. 59, 52 Fed. Rep. 250; O'Reily v. Campbell, 116 U. S. 418; Schultz v. Allyn (Ariz.), 48 Pac. Rep. 960; Lee Doon v. Teah, 68 Cal. 43, 8 Pac. Rep. 621; Moritz v. Lavelle, 77 Cal. 10, 18 Pac. Rep. 803: Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. Rep. 1047; McFeters v. Pierson, 15 Colo. 201; Keeler v. Trueman, 15 Colo. 143, 25 Pac. Rep. 311; Jackson v. Dines, 13 Colo. 90, 21 Pac. Rep. 918; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. Rep. 1019; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 56 Pac. Rep. 300; Strickly v. Hill (Utah), 62 Pac. Rep. 893; Rosenthal v. Ives, 2 Idaho, 244, 12 Pac. Rep. 904; Bohanan v. Howe, 3 Idaho, 417, 17 Pac. Rep. 583; Ducie v. Ford, 8 Mont. 233, 19 Pac. Rep. 414.

[2] Citing Bohanan v. Howe, *supra*.

action and a money judgment is the only relief sought. In actions of the latter class it has always been allowable for the plaintiff to make general averment of his title or possession in the first instance. Besides, the capacity of the plaintiff to sue in an ordinary civil action is generally presumed, and the burden of controverting such authority, if attempted, rests upon the defendant. No such attempt was made in this case. The plaintiffs gave evidence that all and each of them were citizens of the United States, and no contradictory evidence was offered on the point. We see no reason to doubt that the evidence was sufficient to satisfy the jury that plaintiffs were citizens of the United States; that they have complied with the requirements essential to the location of a valid mining claim; and that their right thereto was a subsisting one at the time of the injuries complained of."[1]

[1] McFeters v. Pierson, 15 Colo. 201, citing 1 Chit. Plead. 195; 2 Wat. Tresp., sec. 987; Strepey v. Stark, 7 Colo. 614, 5 Pac. Rep. 111; Gwillim v. Donnellan, 115 U. S. 49. See also cases cited in note 1, *ante*, p. 236. In McKinley Creek M. Co. v. Alaska Creek M. Co., 183 U. S. 563, which was an action for injunction, and the citizenship of plaintiff and its predecessors in interest was attempted to be raised, following the rule in former cases, Manuel v. Wulff and Governeur's Heirs v. Robertson, it was decided that the question of location by an alien was open to attack only by the government. This was not an adverse suit, and of course goes no further than the matter before the court.

CHAPTER V.

LOCATION BY AGENTS AND MINORS.

§ 272. Preliminary observations—Application of the principles of agency in locating mines and of the controlling maxim.
273. Same subject — Authority unnecessary — Ratification — General discussion.
274. Authority of agents — Amending and completing locations.
275. Location by minors considered and held to be valid.
276. Summary of this part and general restatement of it.

§ 272. Preliminary observations — Application of the principles of agency in locating mines and of the controlling maxim.—That principle of the law which has found expression in the maxim "*qui facit per alium facit per se*" receives the highest recognition in mining law, and is carried to its fullest length in the location of mining claims. It is enforced in the same way and to the same extent as in its application to other real estate generally, with this distinction and difference, however, that it is seldom essential that the authority be given in writing. In fact it is often implied from other relations; as, for instance, in mining partnerships,[1] or pursuant to implied authority arising from grub-stake or prospecting contracts.[2] In such cases not only is the authority vested in the agent to make the location in his principal's name and as the act of his principal, but it is enforced in the most rigid manner in those contracts arising out of the principle, discussed in another branch of our work, that where one furnishes the supplies and tools, or other expenses, and the other furnishes the labor, upon the agreement that they shall share equally, even though it be verbal, it will be enforced. Nor is it necessary in any event

[1] *Post*, Part XIV, ch. II. [2] *Post*, Part XIV, ch. III.

that the authority be given in advance, as, like all other questions of agency, it may arise from the adoption of the fruits.

§ 273. Same subject — Authority unnecessary — Ratification — General discussion.— From this doctrine of agency, extended as shown in the last section, flows the authority, recognized by statute, even to the making of affidavits in certain cases, that whatever the principal might do if personally present may be done by an agent with the same effect.[1] Of course, this is with reference to implied authority or such authority as the law recognizes as existing, without reference to the special agreement of the parties, because, where they have defined their relationship in writing, that tells its own story and defines itself. Pursuing this principle, and within the lines of the statute, a location may be made in the name of another than the actual locator,[2] and when so made, the person in whose name it is made becomes vested with the legal title to the claim.[3] And in an early case in Arizona, it was held by a very able judge that the law implies authority in one person to locate a mining claim in the name of another from the fact of making the location — a singular rule, but undoubtedly true,— and that no authority is necessary.[4] And in a Colorado case it was held that any citizen who is authorized to locate mining claims on the public domain of the United States may perform all the necessary acts of appropriation through the agency of others.[5] It is common practice in the mining states for one person to locate any number of friends in the same location with him, and, we believe, of frequent occurrence wherever mining operations are carried on or claims are located.[6]

[1] Schultz v. Keeler, 2 Idaho, 532, 21 Pac. Rep. 418.

[2] Morton v. Solambo Copper M. Co., 26 Cal. 527.

[3] Van Valkenburg v. Huff, 1 Nev. 142; Moore v. Hammerstag, 109 Cal. 122, 41 Pac. Rep. 805; Dunlap v. Patterson (Idaho), 42 Pac. Rep. 504.

[4] Rush v. French, 1 Ariz. 99, 25 Pac. Rep. 816.

[5] Murley v. Ennis, 2 Colo. 300.

[6] Morton v. Solambo Copper M. Co., *supra;* Book v. Justice M. Co., 58 Fed. Rep. 106.

§ 274. Authority of agents — Amending and completing locations.— As indicated in a previous section,[1] the authority of the agent in mining matters may and often does rest upon much less satisfactory proof than would be required in ordinary commercial transactions, much less respecting other classes of real estate. Thus, as we have seen, the authority will often be presumed.[2] A like authority exists to make necessary amendments or to complete a location. For example, where the location of a mine upon which the discoverer posted a written notice claiming a right to locate fifteen hundred feet on the lead, and three hundred feet on each side, is completed by other persons marking the boundaries and posting a new location notice, under an agreement by which they were to complete the location for one-half the claim, it inures to the benefit of all, although descriptive terms were applied in the new notice to the name given in the first notice.[3] So additional territory, embraced in an additional location certificate of a mining claim, filed by a trustee appointed by the owners of the original location, to obtain patent to the mine, inures to the benefit of all the *cestuis que trust* instead of the trustee alone.[4] This, under a statute requiring an additional location certificate to be based on the original certificate, when it relates back to the first location.[5]

§ 275. Location by minors considered and held to be valid.— So far as we are advised, or have been able to ascertain from the books, the question has been raised but once as to the legality of a location made by a minor. Upon principle, we see no reason why an emancipated infant may not lawfully acquire title to a mining claim by location; the only difference between an emancipated and unemancipated infant, in any case, would be as between him and his parent.

In a case in California, this subject was taken up and

[1] *Ante*, § 272.

[2] Rush v. French (Ariz.), 25 Pac. Rep. 816.

[3] Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 190.

[4] Hallack v. Traber, 23 Colo. 14, 46 Pac. Rep. 110.

[5] Gen. Statutes of Colorado of 1883, § 2409; Hallack v. Traber, *supra*.

thoughtfully dealt with by Mr. Commissioner Hayne, whose opinion became the decision of department one of the supreme court. We extract the following from it: "Does the fact that these plaintiffs were minors at the time of the location invalidate the notice as to them? We have not been referred to any decisions which hold that it does. No requirement that the citizen shall be of any particular age is expressed, and unless we are prepared to affirm that minors are not citizens, we do not see how we can say that they are not entitled to the benefit of the act. (The proof showed that the locators were born in the state of California.) This conclusion is strengthened by the circumstance that in some instances the statute expressly requires that the citizen shall be of age. Thus, in reference to coal lands, the provision is that 'every person above the age of twenty-one years who is a citizen of the United States,' etc.; so with reference to homesteads, the provision is that 'every person over the age of twenty-one years and a citizen,' etc. The expression of a requirement as to age in some instances and the omission of it in others is significant. Nor is there any reason in the nature of things why a minor may not make a valid location. After the preliminary steps are taken, all that is required is that a certain amount of work shall be done. If the minor cannot do it, he can get any one to do it for him; the condition imposed by the statute is fulfilled. If he cannot, the claim lapses and is open to relocation by others. It may be added that so far as we know it is the practice of many mining communities for minors to locate claims."[1]

The legislature of the state of Nevada, as early as 1869, recognized the right of minors not only to locate mining claims, but to convey them to whomsoever they might elect.[2]

§ 276. Summary of this part, and general restatement of it.— The authorities collected and reviewed in this part

[1] Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182.

[2] Act approved Feb. 27, 1869, Comp. Laws 1900, §§ 2723-24. See Appendix "B."

of our work demonstrate, when considered in the retrospect, and carefully summarized, the following condition of the law:

(*a*) That the public mineral lands of the United States are open to location and purchase, and by purchase is meant patenting, by citizens of the United States and those who have declared their intention to become citizens, including corporations organized in, and chartered by, any one of the states or territories.

(*b*) That locations may be made by aliens, and that the location is not void but voidable, and that the irregularity or defect of such location may be cured by (1) the alien declaring his intention to become a citizen, (2) the alien conveying the property to a citizen, or to a corporation considered as a citizen, that is organized in one of the states or territories, (3) by the estate being cast by descent or by will, which for this purpose is a species of conveyance, upon a citizen, or one who has declared his intention to become such.

(*c*) That the question of citizenship can only be raised by inquest of office, or by proceedings in the nature of inquest of office, and this in one of two ways: (1) by the government, which may make the inquiry at any time, (2) by an applicant for patent for conflicting ground, or by the claimant himself applying for patent, either of which proceedings is considered, *pro hac vice*, as in the nature of inquest of office.

(*d*) That except as raised in one of the ways pointed out in the preceding subdivision of this section, the alien may take and hold until office found.

(*e*) That locations may be made by agents, including partners under regular mining partnership, or grub-stake contracts, with the same force and effect as if made by an interested party or principal.

(*f*) Locations may be made by minors.

(*g*) In Mexico there is no special qualification required.

(*h*) In some parts of Canada a free miner's license is required.

PART VI.

OF THE CHARACTER, QUALITY AND SIZE OF A LOCATABLE CLAIM, AND HEREIN OF DEFINITIONS OF "LODES," "VEINS," "ROCK IN PLACE," "PLACERS," "DEPOSITS," "MILL-SITES," "WATER RIGHTS" AND SIMILAR CLAIMS.

CHAPTER I.

OF QUARTZ, VEIN OR LODE CLAIMS, AND HEREIN OF THE DEFINITION OF "LODE," "VEIN," "ROCK IN PLACE," "STRIKE OR COURSE."

§ 279. Preliminary observations and of general size of claims locatable as a vein or lode, and what locatable — Tailings bed.
280. Size of lode claims in placer ground.
281. Similar conditions in Canada.
282. Definition of lode, ledge, vein — General observations — The statute — Terms often synonymous — Definitions should be broad.
283. Other broad definitions, legal, technical and scientific — Origin of the term "lode" — Equivalents used elsewhere.
284. Same — Scientific and special definitions.
285. Other definitions of many of the great mining judges — All forms of rock in place covered by vein or lode.
286. Further definitions — "Broad vein cases" and zone theory.
287. Definition of "in place."
288. Definition of strike or course — "Along the vein."
289. Same subject — Strike or course of the vein as understood by the miners and as defined by the judges in the mining states.

§ 279. Preliminary observations and of general size of claims locatable as a vein or lode, and what locatable — Tailings bed.— It has already been demonstrated in this work that only public mineral lands of the United States are open to location and purchase under the laws of con-

gress and the state laws made in subordination thereto. That statute provides,[1] respecting locations prior to the passage of the law of 1866, that the length of the claim upon the lode should be governed by local rules; after the passage of that law the length and breadth of the claim was regulated by the statute itself, and state statutes made supplementary thereto.[2]

The statute of the United States authorizes the location of both lode and placer claims, which general descriptions are broad enough to cover and include, as we shall demonstrate in this work, every form of valuable mineral *in situ*, besides placers and all forms of valuable deposits, including building stone. It has been held sufficient to authorize the location of a tailings bed;[3] but this is an extreme case, the mineral not being deposited there by nature or in a natural way, and should hardly be considered as authority.

By the statute itself, lode claims are limited to fifteen hundred feet in length by six hundred feet in width, and local state statutes and district rules are authorized, whereby these limits may be decreased, but not increased, and not decreased in width to less than twenty-five feet on each side of the center of the vein, unless adverse claims render a less width necessary. The states, in pursuance of this authority, within the mining region of the Pacific coast, have nearly all enacted statutes wherein the length and width of the claim have been provided for, and in all cases except Colorado, or rather in a few counties in Colorado, the limits provided by state statute are the same as those provided by the statute of the United States. These statutes will be collected in full in the Appendix and it is therefore unnecessary to repeat them at length here.

[1] Act of July 26, 1866, 14 Stat. at L., p. 251; Act of July 9, 1870, 16 Stat. at L., p. 217; Act of May 10, 1872, 17 Stat. at L., p. 91; R. S. U. S., §§ 2319, 2324.

[2] See the reasoning of Justice Field in Steel v. St. Louis S. & R. Co., 106 U. S. 447; Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, id. 408.

[3] Rogers v. Cooney, 7 Nev. 213.

In Colorado the state statute restricts the width of the claim in Gilpin, Clear Creek, Boulder and Summit counties to one hundred and fifty feet; that is, seventy-five feet on each side of the center of the vein or crevice, and in all other counties the width of the claim is that authorized by the federal statute. But the statute permits any county, by vote at any general election, to enlarge the width to that authorized by the law of congress; likewise to restrict the width to less than that so authorized.[1] Of course any such restriction cannot authorize or require the location of a claim narrower in width than the narrowest limit authorized by the act of congress.

Texas not being controlled by United States law has enacted a statute providing for claims not to exceed fifteen hundred feet in length, with parallel end lines, whenever practicable, and containing not more than twenty-one acres.[2]

§ 280. Size of lode claims in placer ground.—The size of a lode claim within a placer claim seems to be settled by the statute itself, for we find that where patent for both lode and placer is applied for, the applicant must pay for his lode, with twenty-five feet of surface ground on each side of the middle of his vein, at five dollars per acre, and for his placer at two dollars and fifty cents per acre.[3] The conclusion is irresistible, therefore, that congress intended this to be the size of a lode claim within a placer. There is but one decision of a court of last resort upon this precise question that has fallen under our observation, and, as we shall be called upon to carefully review that when we treat upon the question of lode and placer in the same ground, and as that seems the better place for elaborate consideration, we shall postpone further commentary upon the subject to that time.[4]

[1] Mills' Ann. Stat. Colo., secs. 3148, 3149, 3137. See also Taylor v. Parenteau, 23 Colo. 368, 48 Pac. Rep. 505.

[2] Act of April 30, 1895, § 4, Laws 1895, p. 198.

[3] R. S. U. S., § 2333.

[4] See *post*, §§ 320, 321.

§ 281. Similar conditions in Canada.—Within the provinces of British North America, composing the Dominion of Canada, excepting New Brunswick, Nova Scotia and British Columbia, in which provinces the leasing of mines prevails solely, there are statutory provisions similar in many respects to those in the United States and of the respective states on this subject authorizing the sale, pursuant to location, of crown lands which have been proclaimed by the governor or lieutenant-governor in council, as the case may be, as crown mineral lands.[1]

There is this distinction, however, that vertical boundaries obtain, and are required, in all cases within the Dominion of Canada, with this exception, that, as to crown lands in Manitoba, the right to mine the vein, with all dips, spurs and angles, is given as deep as it can be mined;[2] or, in the language of the statute, the license "shall authorize the licensee to work every dip, spur and angle of the vein or lode laterally to the depth to which the same can be worked."

These statutes fix the length and breadth of mining ground, whether to be obtained by lease or purchase, and whether obtained by one person or a company or association. The size of the claim, as fixed by these statutes, varies from a claim one hundred and fifty feet long by two hundred and fifty feet wide in the provinces of New Brunswick and Nova

[1] *Nova Scotia:* Chapter 1 of the Acts of 1892, entitled "An act to amend and consolidate the acts relating to mines and minerals." Rev. Stat. Ontario, 1897, ch. 36, as amended by 61 Vict., ch. II, and 62 Vict., ch. X.

Quebec: Act of 1892, 55 & 56 Vict., ch. XX.

Manitoba: Regulations for the disposal of quartz-mining claims in Manitoba and the Northwest Territories, including the Provisional District of Yukon, approved by an order in council dated 21st March, 1898.

New Brunswick: Acts relating to mines and minerals, passed 16th April, 1891. Besides which there is an amendment to the law in New Brunswick relative to manganese lands, dated 22d December, 1892, referring to ch. X, 55 Vict., § 3; and the copper regions applying to the Yukon district, Dominion lands in Manitoba and the Northwest Territories, dated 12th September, 1898.

[2] Mines Act, Manitoba, 1897, § 25.

Scotia, to four hundred acres, being an area of fifty-two chains in width by eighty chains and eighty links in depth, in the province of Quebec. The substance of these statutes, as existing in 1899, is collected in the foot-note.[1]

[1] *Canada — New Brunswick:* Act of April 16, 1891, § 9, provides that quartz mines shall be laid off in areas of 150 feet lengthwise of the general course of the strata by 260 feet across, called class No. 1. And by § 32 it is provided that one person may only be granted a license for 100 acres or less.

Nova Scotia: Act of April 30, 1892, as amended March 11, 1898; Acts of 1892, ch. I; Acts of 1898, chs. 26, 27 and 28. Section 10 of the former act provides for the same sized area as in New Brunswick, viz., 150 by 250 feet.

Quebec: Act of 1892, 55 & 56 Vict., ch. XX; R. S. Quebec, §§ 1421–1582. This statute provides that mining concessions are divided into three classes in unsurveyed territories, viz.: (1) The first class contains 400 acres; 52 chains in width by 80 chains and 80 links in depth. (2) The second class contains 200 acres; 26 chains in width by 80 chains and 80 links in depth. (3) The third class contains 100 acres; 13 chains in width by 80 chains and 80 links in depth.

In surveyed lots the quantity is the same, but they are divided as near as may be into one, two and four lots. 55 & 56 Vict., ch. XX; Act June 24, 1892, ¶ 5, § 1436. See also 43 & 44 Vict., ch. XII, § 25, and R. S. Quebec, 1453.

Ontario: Mines Act R. S. O., ch. 36 (1897), as amended by 61 Vict., ch. XI, and 62 Vict. (2), ch. 10. By § 26 of the act it is provided that in unsurveyed territory the size of the mining location, laid out in rectangular areas, with lines running due north and south and east and west, shall contain one of the following dimensions: (1) 80 chains in length by 40 chains in width, containing 320 acres; or, (2) 40 chains square, containing 160 acres; or, (3) 40 chains in length by 20 chains in width, containing 80 acres; or, (4) 20 chains square, containing 40 acres.

In surveyed lands the limits of locations are as regulated and defined by "Order in Council," but the area of any such location shall not be so restricted to less than 40 acres.

Manitoba: Mines Act March 30, 1897, 60 Vict., ch. XVII. The provisions of this act in respect to the size of mining locations are the same in unsurveyed lands as in Ontario, viz.: 320, 160 and 80 acres respectively, as it applies to the crown lands. Stats. Manitoba, 1897, 60 Vict., ch. XVII, § 7, p. 3. As to crown lands, however, as mentioned above, there is an extended dip-right granted in addition to the other rights.

In provincial lands, however, a different rule applies, and as to those lands a location may be made by a free miner holding a license, of the following dimensions: (1) for one person, 660 feet along the vein or lode by 330 feet on each side

§ 282. Definition of lode, ledge, vein — General observations — The statute — Terms often synonymous — Definitions should be broad.— No set words or phrases have been employed by the courts nor by the geologists in defining the meaning of "lode," "vein," "ledge" or "deposit," nor are they entirely agreed as to the origin of the term "lode;" but there is substantial agreement by all courts as to the enlarged meaning of the words "lode, vein or deposit" as used in the statutes, and that the same were intended to comprehend, describe and include all forms and conditions of the valuable mineral aggregations *in situ*. The words employed by congress to convey the meaning are "mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits."[1]

Mr. Justice Field, in an early case in the circuit court for the district of California, lent the strength of his vigorous mind in defining this statute and the words employed in it. Speaking of the word "lode," he said: "Those acts give no definition to the term. They use it always in connection with the term 'vein.' The act of 1866 provided for the acquisition of a patent by any person or association of persons claiming a vein or lode of quartz or other rock in place bearing gold, silver, cinnabar or copper. The act of 1872 speaks of veins of lodes of quartz or other rock in place

thereof, measuring from the center of the vein or lode; (2) companies of two or more persons, who each hold a miner's license, may stake out and work additional feet along a vein or lode by the above width, in the proportion of 132 additional feet in length for additional miners, not exceeding 1,320 feet in length altogether (20 acres more or less), and may work the claim jointly. Mines Act, 60 Vict., ch. 17, p. 40, § 24, Laws 1897.

Dominion lands: Regulations approved by order in council March 21, 1898, apply to all Dominion lands in Manitoba and the Northwest Territory, including the Provisional District of the Yukon. The size of claims so provided for is 1,500 feet in length by 1,500 feet in breadth. Regulations, etc., above mentioned, § 11.

[1] R. S. U. S., § 2320.

bearing similar metals or ores. Any definition of the term should therefore be sufficiently broad to embrace deposits of the several metals or ores here mentioned. In the construction of statutes general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineral matter, or, more accurately, an aggregation of mineral matter containing ores in fissures."[1]

Congress evidently intended to use the words "lode," "vein" and "deposit" in an enlarged and comprehensive rather than a restricted sense. Cinnabar is not found in any fissure of the earth's crust, or in any lode, as defined by geologists, yet the acts of congress speak of lodes of quartz or other rock in place bearing cinnabar, the words thus employed indicating an intention to cover all classes and conditions of ore crevices in rock in place.[2]

[1] Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819, No. 4,528. See also Von Cotta, Treatise on Ore Deposits, Prime's Translation, p. 26.

[2] See North Noonday M. Co. v. Orient M. Co., 6 Sawy. 249, 1 Fed. Rep. 522; Leadville M. Co. v. Fitzgerald, 1 McCrary, 480, 15 Fed. Cas., p. 98, No. 8,158; United States v. Iron Silver M. Co., 128 U. S. 673; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666; Iron Silver M. Co. v. Cheesman, 116 U. S. 529; Mount Diablo M. Co. v. Callison, 5 Sawy. 439, 17 Fed. Cas. 918, No. 9,886; Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801; Migeon v. Montana Cent. Ry. Co., 77 Fed. Rep. 249, 23 C. C. A. 156; Iron Silver M. Co. v. Mike and Starr G. & S. M. Co., 143 U. S. 39; Meydenbauer v. Stevens, 78 Fed. Rep. 797; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. Rep. 401; Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. Rep. 829; Golden Terra M. Co. v. Mahler, 2 Dak. 399, 4 Morr. M. R. 390; Burk v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49; Moxon v. Wilkinson, 2 Mont. 421; Butte & B. M. Co. v. Societe Anonyme des Mines De-Lexington (Mont.), 58 Pac. Rep. 111; Casey v. Thieveige, 17 Mont. 341, 43 Pac. Rep. 394: Foote v. National M. Co., 2 Mont. 402; Illinois M. Co. v. Raff (N. Mex.), 34 Pac. Rep. 111; Hays v. Lavignino, 17 Utah, 185, 53 Pac. Rep. 1029; Harrington v. Chambers, 3 Utah, 94; Raysback v Anthony, 73 Wis. 572, 41 N. W. Rep. 72; Jones v. Prospect Mt. Tunnel Co., 21 Nev. 389, 31 Pac. Rep. 642; Phillpots v. Blaisdel, 8 Nev. 61.

§ 283. Other broad definitions, legal, technical and scientific — Origin of the term "lode"—Equivalents used elsewhere.—Early in the history of the statute, that is, comparatively early, with reference to the litigation that grew out of it, Hon. Willis Drummond, commissioner of the general land office, was called upon for an expression of opinion as to what was locatable as lodes, veins or ledges under the statute, and in a circular sent out to surveyors-general and registers and receivers he gives these definitions:[1]

"In geology and among miners, veins or lodes imply generally an aggregation of mineral matter found in the fissures of the rocks which inclose it, but are of great variety, veins differing very much in their formation and appearance. 'Lode' is a term in general use among the tin miners of Cornwall, and was introduced on the Pacific coast by emigrants from the Cornish mines, and signifies a fissure filled either by metallic or earthy matters. In several of the mining districts the terms 'lead' and 'ledge' are employed in the local regulations concerning mines. Lead is used to convey the same idea as lode, while ledge would seem to indicate a layer or stratum of mineral interposed between a cross or ridge of rocks. . . .

"European miners mention still others, called in England 'floors,' in Germany 'stockwercke,' and a form of deposit known as fahlband. These latter are, more properly speaking, ore-bearing belts, irregular in their dimensions, but presenting a certain degree of parallelism with each other. Similar in these respects to the fahlbands are the metalliferous zones or 'amygdaloidal bands,' which are said to exist on Mt. Lincoln and Mt. Bross, in Colorado. . . .

"But there is no reason for supposing that the terms were employed in their strict geological signification. But the plain object of the law is to dispose of the mineral lands of the United States at their money value, and what form of

[1] Commissioner Drummond in a land office circular of July 15, 1873, Copp's Min. Lands, pp. 50, 51.

deposit can be embraced in the general phrase 'vein or lode of quartz or other rock in place' be sold at the rate of five dollars per acre."[1]

Mr. Justice Miller, copying from the language of Justice Field in the Eureka case,[2] gives this definition of a lode: "A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface would equally constitute . . . a lode."[3]

Commissioner Drummond, in the circular above referred to,[4] says: "Veins may be either sedimentary, plutonic or segregated, or of infiltration or attrition, depending upon the peculiar formation, or the mode of occurrence of the mineral deposit. There is also another form of deposit different from either of those mentioned above, called 'contact deposit.' . . .

"However, if the question were raised, neither of the forms of deposit known as contact deposit, fahlbands or segregated veins could be accepted as true metalliferous veins, nor could it frequently be made to appear, without expensive excavation, whether the metal in the mine for which a patent is sought occurs in the form of a true vein or not."[5]

§ 284. Same — Scientific and special definitions.— Professor Le Conte thus describes and defines the different veins: "All rocks, but especially metamorphic rocks in mountain regions, are seamed and scarred in every direction as if broken and again mended, as if wounded and again healed. All such seams and scars, of whatever nature and by whatever process formed, are often called by the general name of 'vein.' It is better, however, that dykes and so-called granite veins, or all cases of fissures, filled at the moment of formation by igneous injection, should be separated from the category of veins. True veins, then, are accumulations,

[1] Copp's Mining Lands, p. 52.

[2] Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819.

[3] Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

[4] *Ante*, p. 250; Copp's Mining Lands, pp. 51, 52.

[5] Copp's Min. Lands, p. 52.

mostly in fissures, of certain mineral matters usually in a purer and more sparry form than they exist in the rocks. The accumulation has in all cases taken place subsequently to the formation of the fissure and by a slow process. The limited veins are of three kinds: veins of segregation, veins of infiltration, and great fissure veins. These three, however, graduate into each other in such wise that it is often difficult to determine to which we must refer in any particular case."[1]

Justice Hillyer says: "While metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone cannot be permitted to swallow up, under the name 'lode,' true fissure veins found within its limits."[2]

Mr. Bainbridge calls it "an aggregation of mineral matter in fissures of rock."[3]

The supreme court of Idaho, speaking through Chief Justice Beatty, says that every seam or crevice in the rock, even though filled with clay, earth or rock, does not constitute a lode or vein.[4]

§ 285. Other definitions by many of the great mining judges — All forms of rock in place covered by vein or lode.— Judge Hallett, in an early case in Colorado, defined a lode or vein, in his charge to the jury, as follows: "The books make some distinction between beds and lodes, and they make distinctions in the different classes of veins, as you have heard from counsel. But these distinctions are not made in relation to this matter of the discovery and taking of these mineral deposits. It has been decided that congress, in passing this act, intended by this description to embrace and include all forms of deposit which are lo-

[1] Le Conte, Elements of Geology, p. 284.

[2] Mount Diablo M. & M. Co. v. Callison, 5 Sawy. 439, 17 Fed. Cas. 918.

[3] Bainbridge, Mines (1st Am. from 3d London ed.), p. 2.

[4] Burk v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49.

cated in the general mass of the mountain, by whatever name they may be known. And the distinctions which are adopted by geologists in respect to the different kinds of veins are not important except for one question and for one purpose. . . . Whether this may be called a true vein, a contact vein or a bed; whether it lies with the stratification or transversely to it, the matter is of no importance for the purpose of determining this question. It is in any event a lode if it lies in place, within the meaning of this act, and it is in place if it is inclosed and embraced within the general mass of the mountain, and fixed and immovable in that position."[1]

What the learned judge meant by "fixed in the mass of the mountain" undoubtedly is that it must be in the natural condition of the mountain as distinguished from the mass of drift or deposit eroded from it. And it is "fixed" when it is in the original position in which nature placed it, as distinguished from debris, wash, drift or slide.

The above definition of Judge Hallett was followed in a Wisconsin case, under a statute where veins or lodes were defined as "crevices" or "ranges," and it was there held that these words were equivalents of veins or lodes as used by the judges in the mining states.[2]

Judge Sawyer, in the United States court for the district of Nevada, defined a lode or vein as follows: "The vein or lode authorized to be located is a seam or fissure in the earth's crust, filled with quartz, or with some other kind of rock in place carrying gold, silver or other valuable mineral deposits named in the statute. It may be very thin, and it may be many feet thick, or thin in places, almost or quite 'pinched out,' in miner's phrase, and in other places widening out into extensive bodies of ore. So also in places it may be quite or nearly barren and in other places im-

[1] Stevens v. Williams, 23 Fed. Cas. 40-44, Nos. 13,413, 13,414. See also Stevens v. Gill, 23 Fed. Cas. 12, No. 13,398; Illinois Silver M. Co. v. Rath, 7 N. M. 336, 34 Pac. Rep. 544.

[2] Raisbeck v. Anthony, 73 Wis. 572, 41 N. W. Rep. 72.

mensely rich. It is only necessary to discover a general mineral vein or lode, whether small or large, rich or poor, at the point of discovery, within the lines located, to entitle the miner to make a valid location, including the vein or lode."[1]

In a later case we find this definition: "After a careful consideration we reach the opinion that a vein or lode cannot be in place, within the meaning of the act, unless it should be within the general mass of the mountain. It must be inclosed by or held within the general mass of fixed and immovable rock. It is not enough to find a vein or lode lying on the top of fixed or immovable rock, for that which is on top is not within, and that which is without rock in place cannot be said to be within it. . . . We are therefore led to inquire whether the veins or lodes are so inclosed in the general mass of the mountain or lie only on the surface of the fixed and immovable rock with no other covering than the superficial mass to which reference has been made. . . . If the rock above the lode is in its original position, although somewhat broken and shattered by the movement of the country, or other cause, it is in place."[2]

In a Dakota case, Judge Moody, speaking of a lode or vein, says: "I am inclined to adopt and do adopt the rule of the practical miner and prospector that the vein is discovered when there is disclosed a well-defined body of rock in place carrying gold, which body afterwards proves to be continuous. In this district it frequently occurs that the one line of demarkation between the surrounding country and the vein or body of ore is where the rock begins to bear gold. The slate or country rock itself frequently carries gold, and is successfully and practically and profitably worked as ore. . . . I cannot adopt the rule that the vein must be deemed that part which contains pay ore. The term 'pay ore' is a relative term. What does not now pay

[1] North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522.

[2] Leadville M. Co. v. Fitzgerald, 1 McCrary, 480, 15 Fed. Cas. 98, No. 8,158; Stevens v. Murphy, id.

the expense of milling, what is waste to-day, may, with cheapened transportation and subsistence of operatives, to-morrow be pay ore. . . ."[1]

To this statement it might be further added that, as new and improved methods of reducing ore are discovered and put to practical use, what was considered waste twenty years ago may now be classed as pay ore. The only safe rule, therefore, in defining a lode is to characterize it as a defined and segregated mass of the mountain, distinguishable from the country or rock lying above or below or on either side of it, which carries some of the useful minerals or metals in greater or less quantity.

Other definitions of vein or lode have been made at different times. For instance, Judge Sawyer says: "A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or with some other kind of rock in place carrying gold, silver or other valuable mineral deposits named in the statute."[2]

Judge Hillyer gives this definition, speaking with reference to another case in the federal court:[3] "It was considered in that case that the terms 'vein' and 'lode,' as used by congress, for reasons there given, could not always be restricted to aggregations of mineral matter in fissures of rock."[4]

It may be said generally that if an ore body is continuous to the extent that it may maintain its character, it is in place. So far as the ore body is continuous, it must either have been originally deposited in that form or removed bodily with its inclosing rocks to the place where it is

[1] Golden Terra M. Co. v. Mahler, 2 Dak. 399, 4 M. R. 390.

[2] Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 7 Sawy. 96.

[3] Eureka M. Co. v. Richmond Cons. M. Co., 4 Sawy. 302, Fed. Cas. No. 4,548.

[4] Mount Diablo M. Co. v. Callison, 17 Fed. Cas. 918. In the case of Tabor v. Dexter, 23 Fed. Cas. 16, the court held that, where the lode lay on top of the ground, the hanging wall evidently having been eroded away, it was not a vein of rock in place.

found; and in either of these cases it may be said to be in place within the meaning of the statute.[1]

§ 286. Further definitions — "Broad-vein cases" and zone theory. — The terms "lode," "ledge" and "vein" as used in the statutes, and understood by miners generally, and as defined by the courts, as previously noticed,[2] are synonymous and interchangeable. In their broadest signification and most comprehensive sense, they mean any zone belt or aggregation of mineral-bearing rock or earth distinctive in itself and lying within well-defined boundaries, separating and distinguishing it from the general mass of the mountain or neighboring rock, and must be in place, as we shall hereinafter see. From their general signification has resulted what are popularly known as "broad veins," or "zones." These cases have occasioned much discussion, and a principle has been introduced known as the "broad-vein or broad-apex theory," sometimes called the "mineralized zone" doctrine. Wherever it has been before the courts so far, according to the result of our research, there has been but one case reaching an appellate court where the decision was made squarely upon this point.[3] And even this case, we may say in passing, was decided partially on other grounds. So that what experts and mining lawyers characterize as broad-vein theory, is still virgin soil. In order to appreciate the full force of this condition it will be necessary to repeat, in effect, some little that we have said in the definition of a lode itself.

In a recent case it was said: "In defining lodes and veins the text-books and several of the decisions speak of them as fissures in the earth, filled with quartz in place, and carrying gold and silver or other minerals. But true fissure veins and lodes often exist and are continuous without having any filling in certain points or places of mineral matter. A ma-

[1] Iron Silver M. Co. v. Cheesman, 2 McCrary, 191, 8 Fed. Rep. 297.

[2] *Ante*, §§ 283–285.

[3] Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 1.

jority of such lodes have, in addition to the clean fissure filling of mineral, a considerable amount of decomposed wall rock, clay, etc. In slate formations, . . . it frequently occurs that one of the walls has been subjected to a certain amount of fracture, which results in the formation of a number of seams, and in the decomposition of the material included between the seams of unaffected wall rock, which miners designate as 'horses.' To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissures should, of course, have form and be well defined, with hanging and foot walls. Between these walls will be found bodies of quartz, rich and poor, but there is also liable to be found in many places short or long distances between the quartz bodies or pay chutes where no quartz will be found in the fissures between the walls. Yet the vein exists, and is often as well defined as if the same was filled with quartz. The clay, selvadges, slickensides, striation and ribbing of the walls are frequently as strong evidence of the indication of permanency and continuity as the existence of the quartz itself."[1]

The following language is used by Mr. Justice Field: "Our judgment being that the limestone zone in Ruby hill in Eureka district, lying between the quartzite and the shale, constitutes, within the meaning of the act of congress, one lode of rock-bearing metal."[2]

§ 287. **Definition of "in place."**— The meaning of the words "in place," as used in the statute, is the body of country which has not been affected by the action of the elements and which may remain in its original state and condition, as distinguished from the superficial mass lying above it. It is the solid, fixed rock, as distinguished from the surface debris, slide, alluvial or wash.[3] Commissioner

[1] Cons. Wyo. M. Co. v. Champion M. Co., 68 Fed. Rep. 544.

[2] Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819.

[3] Iron Silver M. Co. v. Cheesman, 116 U. S. 529; Same case below, 8 Fed. Rep. 297, 2 McCrary, 191; Hyman v. Wheeler, 29 Fed. Rep. 353;

Drummond says of it: "It will be observed that the mineral-producing lands are divided into two classes — the one class embraces lands where the mineral matter is within 'rock in place,' or geologically speaking, '*in situ*,' and the second includes placers and all forms of deposit excepting those in 'rock in place.' In this connection I deem it a matter of importance to give the construction this office places upon the expression, 'vein or lode of quartz or rock in place,' to prevent mistakes in locating the two classes of mines referred to, thereby saving the claimants considerable expense and delay."[1] It does not necessarily mean solid rock, in the sense that it should be free from breaks, seams, gashes or general brecciation; it means the hard subsurface forming the make-up of the mountain.

The supreme court of the United States, on this subject, says that "excluding the wash, slide or debris on the surface of the mountain, all things in the mass of the mountain are in place."[2] While in the supreme court of Nevada Justice Bigelow defines it: "So far as shown, the rock on either side was fixed, solid and immovable. Mineral matter so situated, no matter where it is originally formed or deposited, is 'in place' within the meaning of the law."[3]

To constitute rock in place, it is not necessary that it be merely hard or quartz rock, but any combination of rock, broken or mixed up with mineral and other things, is rock in place within the meaning of the statute.[4]

§ 288. Definition of strike or course — "Along the vein." — The statute does not use the words "strike or course;" the words employed there to mean the same thing

Stevens v. Williams, 1 McCrary, 484, 23 Fed. Cas. 40, 44 (Nos. 13,413, 13,414); Leadville M. Co. v. Fitzgerald, 15 Fed. Cas. 98; Cheesman v. Shreeve, 40 Fed. Rep. 787; Burke v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49; Jones v. Prospect Mountain Tunnel Co., 21 Nev. 389, 31 Pac. Rep. 642.

[1] Com'r Circular, Gen. Land Office, July 13, 1873; Copp's Min. Lands, 50, 52; Commissioner to Thos. Boles, July 20, 1871, Copp's Min. Lands, 82.

[2] Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

[3] Jones v. Prospect Mountain Tunnel Co., *supra*.

[4] Stevens v. Williams, *supra*.

which miners describe as strike or course are "along the vein or lode."[1] The strike or course of a vein, which is described in the statute as along the vein, are the simplest words which could have been selected to describe the course, and may be said to be that portion of the vein, or rather that extent of it, which more nearly agrees with the surface of the earth; it is its longitudinal section as distinguished from the dip or course downward, which will be fully considered in the future chapters of this work.[2] It is the axis of the vein on its longitudinal section. Among the earliest cases, if not the very earliest case on this question, which came before the courts for decision, and in which the interpretation of the law was carefully gone into, was the case commonly called the Flagstaff case.[3] In the course of the decision in that case Mr. Justice Bradley used these words to define strike of the vein: "We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and the locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface explorations, we think that the act of congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of the vein should correspond

[1] R. S. U. S., § 2320.

[2] *Post*, Part XI, ch. V. See also Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196, 204; Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463, 469; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597; s. c. (C. C. A.), 83 Fed. Rep. 658, 28 C. C. A. 333; Patterson v. Hitchcock, 8 Colo. 523; Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887; Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662, 23 Pac. Rep. 310.

[3] Flagstaff S. M. Co. v. Tarbet, *supra*.

with its strike, or the line of the level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by the surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether a level or inclined."

The entire ground seems to be carefully covered by the foregoing extract from that opinion, and leaves nothing necessary to be added, except that in common practice the outcrop of a vein, as indicated by the learned judge, will not always demonstrate its true strike; this owing to the surface being eroded away, and a consequent dip exposure, as was said to be true in a Dakota case;[1] or it may be a partial dip and strike exposure, as was the case of the Tyler vein in the Last Chance cases.[2] This matter will be more elaborately considered when we come to deal with the apex. It is sufficient for the purpose of the present occasion to say that the law evidently contemplates that the claim shall be laid along the course or strike of the vein, and that the end lines thereof should be made parallel to each other and laid across the dip of the vein; and while parallelism is indispensable, the other feature is not, namely, that they be laid to the true dip, as that is often impossible of exact determination in the early developments of the claim.

§ 289. Same subject — Strike or course of the vein as understood by the miners and as defined by the judges in the mining states.— The strike or course of the vein or lode is defined to be that portion of the lode in its longitudinal course, as distinguished from the portion extending downward into the earth, or dipping into the mountain side or the earth's crust. It is the extension of a lode or deposit

[1] Duggan v. Davey, *supra*.

[2] Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 557; Tyler v. Last Chance M. Co., 71 Fed. Rep. 848; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

on its horizontal line, synonymous with trend or course. It may be said to be the course of a vein on its horizontal line into the earth's surface.[1]

Judge Beatty, now chief justice of the state of California, in his testimony given before the Public Land Commission said: "The strike, or course, of a vein is determined by a horizontal line drawn between its extremities and that depth at which it attains its greatest longitudinal extent. The dip of a vein, 'its course downward,' is at right angles to its strike; or, in other words, if a vein is cut by a vertical plane at right angles to its course the line of section will be the line of its dip. . . . The strike, or course, of a vein can never be exactly determined until it has been explored to its greatest extent; but a comparatively slight development near the surface will generally show its course with sufficient accuracy for the purpose of a location. The dip having an exact mathematical relation to the course of the vein is, of course, undetermined until the strike is determined; but, practically, the line of dip is closely approximated by taking the steepest . . . line by which a vein can be followed downward."[2]

Mr. Lindley in his work on Mines reproduces this testimony and gives it his approval.[3]

In the United States supreme court it has been defined as the course of a vein on its horizontal line under the earth's surface.[4]

[1] Mr. Morrison defines it as "The extension of a lode or deposit on a horizontal line. Synonymous with trend and course." Morr. M. R. (10th ed.), p. 475, citing Von Cotta, 19.

[2] Report of Public Land Commission, p. 399.

[3] Lindl. Mines, sec. 318.

[4] Flagstaff S. M. Co. v. Tarbet, 98 U. S. 453.

CHAPTER II.

STATUTORY TUNNEL CLAIMS.

§ 293. Tunnel claims under the statute.
294. The intention of congress as defined by the supreme court of Montana.
295. Manner of locating a statutory tunnel claim.
296. State statutes regulating tunnels — Power of the legislature considered.
297. Same subject — State statutes regulating manner of locating and marking the lode in the tunnel.
298. "Line of the tunnel" defined.
299. "Line of the tunnel" as defined by the courts.
300. Same — Extent of claim discovered in tunnel — The correct rule as enunciated by the circuit court of appeals.
301. "Face of the tunnel" defined.
302. General tunnel rights.
303. Reasonable diligence defined — Utmost good faith required.
304. Miscellaneous — Excessive tunnel claims — Protecting line of tunnel.
305. May protect tunnel by injunction.
306. Summary — Construing the statute.

§ 293. Tunnel claims under the statute.— The necessity of protecting the running of a tunnel for the discovery of "blind lodes or veins" was clearly recognized and is amply provided for in the statute.[1] The legislation itself is wise. The principal difficulty experienced in practice is the failure of the law-makers to define "reasonable diligence." The statute manifests an apparent intention on the part of its framers to protect the tunnel claimant, throughout the entire length of three thousand feet, in the enjoyment of his rights, and to preserve those rights from encroachment so long as he operates his tunnel with reasonable diligence. Therefore, during the time he so operates his tunnel, there

[1] R. S. U. S., § 2323.

is a reservation in his favor, extending three thousand feet from the "face" of his tunnel, with fifteen hundred feet in the opposite direction on the strike of the vein, from either wall of his tunnel, or he may lay his claim fifteen hundred feet on the vein laid across his tunnel in any direction, provided his discovery is wholly within his claim as he thus measures and claims it.[1] This statute reads: "Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owner of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from face of such tunnel, on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered upon the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."[2]

§ 294. The intention of congress as defined by the supreme court of Montana.— The supreme court of Montana carefully considered the circumstances surrounding a tunnel claim, and the law and policy of the law controlling the right, and we feel justified in reproducing the following extract from the opinion: "It seems to us that the intent of the statute is to provide for this condition in which the parties are placed, and reserves to the tunnel claimant the

[1] See Enterprise M. Co. v. Rico-Aspen M. Co., 13 C. C. A. 390; affirmed, 167 U. S. 108; Campbell v. Ellet, 167 U. S. 116; Glacier Mtn. Silver M. Co. v. Willis, 127 U. S. 471; Bodie Tunnel Co. v. Bechtel M. Co., 8 C. L. O. 173; Table Mt. Tunnel Co. v. Stranahan, 21 Cal. 548; Corning Tunnel Co. v. Pell, 4 Colo. 507; Ellet v. Campbell, 18 Colo. 510, 33 Pac. Rep. 521; Back v. Sierra Nevada Cons. M. Co., 2 Idaho, 386, 17 Pac. Rep. 83; Hope M. Co. v. Brown, 11 Mont. 370, 28 Pac. Rep. 732, partially overruling same case, 7 Mont. 550, 19 Pac. Rep. 218.

[2] R. S. U. S., § 2323.

opportunity to demonstrate what veins or lodes may be discovered therein, before allowing such veins or lodes to be appropriated and taken by another. It is argued that it is against the policy of the law to allow tracts of mining land to be thus held in reserve, before any mines are discovered therein. This argument is sought to be supported by pointing to other statutes allowing locations of mining claims to be made only on discovery of valuable deposits of precious metals therein. This argument may be answered, however, by the observation that the policy of the law also seems to aim at the discovery and development of mines. And so, in order to encourage parties to undertake the more hazardous enterprise of driving tunnels in localities where lodes or veins do not appear on the surface, and are not known to exist,— localities which otherwise might be allowed to lie unexplored,— the law has provided a reservation not provided in case of less hazardous and less expensive manner of prospecting."[1] This is a fair statement of the general policy and purposes of the law. That this law in its practical results is more sweeping than its framers ever believed it would be arises from the fact that veins are found flatter than it was expected they would be. However, as long as it remains unrepealed it must be respected.

§ 295. Manner of locating a statutory tunnel claim.— In the absence of state statutes or district rules defining the manner of locating or recording tunnel claims, the general custom, which is almost universal, governing their location must prevail. This, briefly stated, is similar in all respects to the acts required to locate a lode or vein, namely, the posting of a notice on the claim and recording a copy thereof where recording is made necessary. This notice should contain a description of the face or mouth of the tunnel with reference to some natural object or permanent

[1] Hope M. Co. v. Brown, 11 Mont. 370, 28 Pac. Rep. 732. See also Enterprise M. Co. v. Rico-Aspen M. Co., 13 C. C. A. 390, 167 U. S. 108; Ellet v. Campbell, 18 Colo. 510; affirmed, 167 U. S. 114.

monument, together with a general description of the course of the proposed tunnel and the purpose for which it is located.[1]

The land office regulations make the further requirement that this notice should state the height and width of the tunnel and that its course should be staked, as near as practicable, on the surface, so as to enable prospectors to ascertain whether they are within the lines of the tunnel.[2] This is a reasonable requirement and should be observed.

§ 296. State statutes regulating tunnels — Power of the legislature considered.— Nearly all the states have enacted statutes on the subject of tunnel claims, some of them properly supplemental to the federal statutes, and within the authority conferred thereby.[3] Others, however, are dangerously near the border line of want of authority or encroaching upon the ground which properly belongs to congress. These statutes will be found at length in the Appendix, and it is unnecessary, therefore, to notice them in detail, except to say that in general they provide for the same species of notice and record as for the ordinary lode claim, and this being within the authority authorized by the law of congress, ought to be observed. Some of these statutes, however, as above indicated, have assumed to fix the width of a tunnel claim, but it may now be said to be settled that the state legislature has no such power. Especially is this so where the statute was enacted prior to the federal statute;[4] and it would be likewise true where the state legislation goes beyond the authority of the section of the statute above referred to, or is in conflict with the federal statute.[5]

[1] R. S. U. S., § 2323; Land Office Circular of June 24, 1899, pars. 21, 22.

[2] Land Office Circular, *supra*, pars. 21–24.

[3] R. S. U. S., § 2324.

[4] R. S. U. S., § 2323.

[5] Campbell v. Ellet, 167 U. S. 114, affirming s. c., 18 Colo. 510, 33 Pac. Rep. 521; Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 114. See also Appendix.

§ 297. Same subject — State statutes regulating manner of locating and marking the lode in the tunnel.— Some dispute has arisen as to what constitutes a valid location and discovery of a lode discovered in a tunnel, and the supreme court of Colorado enunciated the doctrine, which may now be regarded as settled law, that a lode discovered in a tunnel, run in accordance with the provisions of the statute,[1] notice of which was posted at the mouth of the tunnel and duly recorded, need not be located by the discoverer on the surface in order to protect his rights against a subsequent locator on the surface.[2] This decision was affirmed in the supreme court of the United States, where it was expressly held by the court, speaking through Mr. Justice Brewer, that the filing and recording of a proper location notice, a copy of which is posted at the mouth of the tunnel, constitute the only acts necessary to hold all veins of ore discovered on the line of the tunnel; this upon the theory that such location, when kept alive by work, creates a reservation thereof in favor of the tunnel claimant.[3] Practically the same rule is enunciated in another case.[4]

From the statute itself, taken altogether, and independent of other considerations, it would seem at first that marking on the surface ought to be part of the acts of locating a lode discovered in the tunnel, for the reason that it must be remembered that the statute only gives the tunnel claimant fifteen hundred feet of that lode, and other would-be locators have the right to know to what particular fifteen hundred feet the tunnel claimant intends to fix his reservation and assert his title. It must be remembered that his right extends a distance of over twenty-nine hundred feet along the strike of the vein discovered in the tunnel, and may be asserted upon any fifteen hundred feet of that, but not on all; but the supreme court of the United States have

[1] R. S. U. S., § 2323.

[2] Ellet v. Campbell, 18 Colo. 510, 33 Pac. Rep. 521.

[3] Campbell v. Ellet, 167 U. S. 114.

[4] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 108.

held otherwise,[1] the reason being, although not very clearly assigned, that the tunnel claimant cannot know where on the surface to place such marks or stakes.[2]

§ 298. "Line of the tunnel" defined.— The meaning of the term "line" of the tunnel, and the extent of the rights of the tunnel claimant, has caused considerable litigation. The land office has held it to mean, without attempting to define rights, the width of the bore of the tunnel;[3] and the early cases in Montana and Colorado follow substantially this doctrine,[4] but they have likewise attempted to fix by statute a width similar to the width of the mining claim. As now understood and defined by the supreme court of the United States, it seems to indicate merely a line without breadth, at least not wider than the bore of the tunnel; and if a vein crosses that line in the tunnel it may be said to be discovered in the tunnel.[5] "Line," therefore, must mean the ground dug out by the bore of the tunnel, as a vein discovered in any portion of such bore is discovered in the tunnel. The reasoning of the courts which has led up to this conclusion seems necessary to a correct understanding of the law as we now understand it, and we therefore produce it in the next section.

§ 299. "Line of the tunnel," as defined by the courts. As already noticed,[6] the statute gives the right of possession of all veins or lodes on the line of the tunnel not previously known to exist. What is meant by line of the tunnel has been the subject of judicial discussion which has not pur-

[1] Campbell v. Ellet, 167 U. S. 114.

[2] Enterprise M. Co. v. Rico-Aspen Co., 167 U. S. 108.

[3] Circular of Instructions, October 31, 1881, §§ 21, 23; Copp's Min. Lands, pp. 35, 36.

[4] Hope M. Co. v. Brown, 7 Mont. 550, 19 Pac. Rep. 218, overruled in part, 11 Mont. 370, 28 Pac. Rep. 732; Back v. Sierra Nevada Cons. M. Co., 2 Idaho, 386, 17 Pac. Rep. 83. See Corning Tunnel Co. v. Pell, 4 Colo. 507.

[5] Enterprise M. Co. v. Rico-Aspen M. Co., 13 C. C. A. 390; affirmed, 167 U. S. 108; Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471; R. S. U. S., § 2323.

[6] *Ante*, § 293. See also *post*, § 306.

sued a very harmonious course. Some courts have held that the locator of the tunnel, so long as he prosecutes his work with reasonable diligence, has a block of ground three thousand by fifteen hundred feet from which he is entitled to exclude all comers,[1] while others construe the line of the tunnel to mean the mere straight line the width of the tunnel itself. The right of possession of the lode being dependent upon its discovery in the tunnel, it follows that it cannot attach prior to such discovery.[2]

In an early Colorado case,[3] where it was contended that the line of the tunnel meant the entire length and width of the surveyed tunnel site, that is, fifteen hundred by three thousand feet, Elbert, J., speaking for the supreme court, says: "The policy of the general government has been to prevent monopoly of its mineral lands. . . . The construction claimed is a contravention of this policy; nor can it be justified by the language of the section. Line, as a term of surveying, is that which has length without breadth, but, as used in this section, having reference to the subject it was intended to describe, we think it designates a width marked by the exterior lines or sides of a tunnel. A greater width than this it cannot fairly be said to imply. The line of the tunnel being the width of the tunnel, the location (in the sense that it is here used, of initial point of location or discovery shaft) of the Slide lode, was not on the line of the appellant's tunnel. . . . The location not being on the line of the tunnel, it is immaterial whether the lode appeared upon the surface or not, as in either case the evidence did not show any right upon the part of the (tunnel claimant)." This reasoning was upheld and supported by the supreme court of Montana,[4] and a conclusion not inconsistent with it was reached by the supreme court of Idaho.[5]

[1] See observations on decision of trial court, Tunnel Co. v. Pell, *infra*.

[2] Corning Tunnel Co. v. Pell, 4 Colo. 507.

[3] Corning Tunnel Co. v. Pell, *supra*.

[4] Hope M. Co. v. Brown, 7 Mont. 550, 19 Pac. Rep. 218.

[5] Back v. Sierra Nevada Cons. M. Co., 2 Idaho, 886, 17 Pac. Rep. 83.

But the Colorado court, in a later case involving the rights of the respective owners of the tunnel and surface claimants to a vein discovered in the tunnel, the subject-matter having reference to the same tunnel and vein previously referred to, held that the reasoning of the court in Tunnel Co. v. Pell was mere *dictum*,— not necessary to a decision of the case; and a conclusion radically at variance with the previous ruling of the court was there reached.[1] In the last case it was said: "A tunnel location has been called a 'tunnel claim' by the highest judicial authority, and it seems that a valid tunnel location may inure to the benefit and protection of mineral lodes discovered in said tunnel. . . . A lode not previously known to exist and not appearing on the surface was discovered in such tunnel on the line thereof while work in the tunnel was being diligently prosecuted for such purpose. Notice was posted describing the lode with reference to such tunnel location. Under such circumstances the (tunnel claimant) has the right of possession of such lode, and is entitled to be protected in such right against appellee, a junior surface locator on the same lode. . . . What is the extent of the tunnel owner's right of possession to a vein discovered in the tunnel? The language of the statute is that he shall have the right of possession to the same extent as if discovered from the surface. In our opinion the words 'same extent' mean the same extent 'along the vein or lode.' . . . In this case . . . the discoverer was entitled to claim seven hundred and fifty feet of the lode each way from the point of discovery, or, in the language of the statute, 'fifteen hundred feet in length along the vein or lode.'"[2]

§ 300. Same — Extent of claim discovered in tunnel — The correct rule as enunciated by the circuit court of appeals.— In a well-considered case in the circuit court of appeals for the eighth circuit, what we conceive to be a

[1] Ellet v. Campbell, 18 Colo. 510.

[2] Ellet v. Campbell, *supra;* affirmed, 167 U. S. 116. See also Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471; Morr. Min. Rights (10th ed.), p. 207.

correct interpretation of this law is found. The facts of the case were that the Enterprise Company owned the Group tunnel, which was located in 1887; the Rico-Aspen Company had secured patent to the Vestal mining claim, running nearly parallel with the tunnel. The vein was encountered in the tunnel while work was being prosecuted with reasonable diligence, which the tunnel owners located, claiming fifty-four feet northeasterly and fourteen hundred forty-six feet southwesterly from the line of the tunnel. It will be seen that this state of facts raised, in addition to the question as to the relative rights of the discoverers of a blind lode in a tunnel and a surface discovery, the further question whether or not the discoverers of such vein in a tunnel were entitled to claim the same on both sides of their tunnel, and if so to what extent. Judge Sanborn, speaking for the court, says: "The striking characteristic of this section of the act is that it gives the right to the possession of certain veins or lodes to the diligent owner of the tunnel before his discovery or location of any lode or vein whatever, contingent only upon his subsequent discovery of such veins in his tunnel. Veins or lodes discovered on the surface or disclosed by shaft from the surface must be found before any right to them vests, . . . but this section declares that the owners of a tunnel, by simply locating and diligently prosecuting it, without the discovery of any lode or vein whatever, 'shall have the right of possession.' . . . This section of the statute, then, and not the provision of the law relative to surface locations, must be taken to be the measure of the right and title to a vein which the owner of a tunnel acquires by its discovery, and it certainly gives him a far greater and more valuable right than is granted to a prospector upon the surface. The clause, 'to the same extent as if discovered from the surface,' is evidently used in its natural, customary sense, and measures the extent, the distance along the lode or vein, to which the right of possession given by the statute extends, and not the general benefits conferred by the discovery. . . . It is clear that

the words 'not previously known to exist' refer to the time of the location and commencement of the tunnel, and not to the respective times of the discoveries of the various veins in the tunnel. It is the right to the possession of the veins not known to exist before the owners of the tunnel located and commenced to excavate it that is secured to them by this statute, if they subsequently find them in their tunnel, and not the right to those only not known to exist when they reached them in the tunnel. . . .

"No appropriation of the public land on the line of this tunnel that would deprive the owner of his right to discover and possess this vein could be affected by a discovery and location from the surface after the location and commencement of the tunnel, in the face of the express declaration in this section that such surface locations shall be void. . . .

"It must be borne in mind, however, that it is only the right to veins that strike the line of the tunnel, and only such of those veins as are discovered in the tunnel, that the owner gains any inchoate right to the possession of, if this claim of the appellant is sustained. Others may discover and hold all veins within fifteen hundred feet of the line of the tunnel that do not strike or cross its line, and all that do strike it that are not discovered in it. Nor can the owner of such a tunnel preserve his right to undiscovered veins by lazy and perfunctory work. . . . There is a wide margin between the line of abandonment and that of reasonable diligence, and we have no doubt that the courts will so apply the rule of diligence, under this section, that the prompt and energetic prosecutor of a tunnel, will receive the just rewards the act of congress guaranties to his diligence, while the slothful and negligent will not be permitted to deprive other prospectors of the rights or privileges the act secures to them. . . . We are of the opinion that by section 4 of this act[1] they intended to and did guaranty to the owners of such a tunnel the possession of all the veins they discovered therein

[1] R. S. U. S., § 2323.

to the same extent along the veins as if they had discovered them from the surface. . . . If he had discovered it from the surface he could have located his claim upon and could have held (if he had the superior title . . .) any fifteen hundred feet along the vein that included his discovery shaft. It follows that the appellant had the right to any fifteen hundred feet on this vein that included its point of discovery in the tunnel, and that its location and claim of possession of fifty-four feet of the vein northeasterly and fourteen hundred and forty-six feet southwesterly . . . must be sustained."[1]

§ 301. **"Face of the tunnel" defined.**— The land department has defined the "face" of the tunnel to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited by force of the reservation in the statute.[2] This definition is somewhat at variance with the term "face of the tunnel," as used by miners, which means the working face, wherever that may be, which is constantly shifting, and so could not be the "face" meant by the statute.[3]

§ 302. **General tunnel rights.**— It will be seen by the foregoing, as we have elsewhere observed,[4] that the rights conferred upon the tunnel claimant, so long as he complies with the law and prosecutes his work with diligence, are broad and sweeping. It gives him the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, which may be discovered in the tunnel, to the same extent as if discovered from the surface.[5] The discovery in

[1] Enterprise M. Co. v. Rico-Aspen M. Co., 66 Fed. Rep. 200, 13 C. C. A. 390.

[2] General Circular of Instruction, Oct. 31, 1881, § 22; Copp's Min. Lands, pp. 35–36.

[3] See Lindl. Mines, § 477.

[4] *Ante*, § 234.

[5] R. S. U. S., § 2323; Campbell v. Ellet, 167 U. S. 114; Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108; s. c., 66 Fed. Rep. 200, 13 C. C.

the tunnel is considered the same as discovery on the surface. Here, of course, is an entire departure from the rule of the ordinary discovery of lode claims upon the surface, as his discovery beneath the surface is considered the equivalent of surface discovery; and his rights relate to the date of commencing the tunnel, from which time he is considered by the law as being in possession of all those veins. That this is a striking departure may be conceded, but it is no more striking than the immensity of the grant. Besides, he only gets blind lodes and veins not previously known to exist. Another striking feature of the section, or rather, enlarging upon one not yet noted, is his presumed possession, which, with the other rights granted, enables him to cut off all intervening claims.[1] Philosophical and satisfactory solution of the extent and, at the same time, limits of the rights of respective claimants under this statute, when read *in pari materia* with the other parts of the mining law, seems impossible. Mr. Lindley suggests that the entire statute be taken by its four corners and construed.[2] The difficulty with this is, that this section, standing alone, is plain and unambiguous; it is when an attempt is made to read it *in pari materia* with the other sections of the statute that the difficulty begins. Standing alone, it explains itself; and, as we have elsewhere observed, if it is wrong because a bestowing a monopoly, we cannot therefore shut our eyes to its plain and obvious meaning; the remedy is with the legislative power.

§ 303. Reasonable diligence defined — Utmost good faith required.— The statute leaves it largely to conjecture as to just what is meant by the term "reasonable diligence" as used in section 2323, but the evident intention is that in all cases the utmost good faith will be required. Mere lazy,

A. 390; Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471; Hope M. Co. v. Brown, 11 Mont. 370; Ellet v. Campbell, 18 Colo. 510.

[1] Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108; Campbell v. Ellet, 167 U. S. 114.

[2] Lindl. Mines, § 491.

perfunctory work will not satisfy the statute;[1] nor will working a tunnel two or three days each six months be considered such diligent prosecution of work as will secure to the tunnel claimant the rights conferred, and protect the tunnel from forfeiture. But it must be prosecuted with reasonable diligence, which means reasonable under all the circumstances of the case; and this is a question of fact ordinarily, unless the facts of a given case are such that reasonable men cannot differ concerning them, when it becomes a question of law. When the tunnel is thus prosecuted with diligence, as observed in the previous section, the rights relate to the date of locating the tunnel and commencing work thereon. But these rights attach only to blind or unknown lodes or veins, and this time applies to the date of the commencement of the tunnel.[2] Whether the same rule applies to a tunnel claim that applies to the ordinary mining claim, with reference to resumption after forfeiture, has never been judicially determined. We apprehend that if during an interim when work was not being diligently prosecuted, certainly when six months' cessation had occurred, and a lode claim should be located upon a valid discovery, it would have the superior right. The effect of resumption, however, the cessation not being taken advantage of, would be the same as in a lode claim, namely, to reinstate all previously acquired rights.

§ 304. Miscellaneous — Excessive tunnel claims — Protecting line of tunnel. — The general rule with reference to the result of marking excessive boundaries will be carefully set forth when we come to deal with the question of marking boundaries, or marking the location upon the ground, as one of the acts of location.[3] It may be stated that the general rule as to excessive boundaries to lode

[1] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 13 C. C. A. 390, 66 Fed. Rep. 200. See also 2 Lindl. Mines, p. 1167.

[2] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 108. See also Back v. Sierra Nevada Cons. M. Co., 2 Idaho, 386, 17 Pac. Rep. 83; Hope M. Co. v. Brown, 11 Mont. 370, 7 Mont. 550, 19 Pac. Rep. 218.

[3] *Post*, Part VII, ch. III.

claims applies with equal force to excessive boundaries in tunnel claims. And where more land is sought to be appropriated than allowed by statute, the claim will not be void for that reason, but will be held good for the statutory amount, and rejected as to the excess.[1] In the case just cited it was held that a tunnel claim five thousand feet in length will be held good and valid to the extent of the statutory length of three thousand feet, and the remainder rejected. The supreme court of California has said that no location of a claim can be so extended as to amount to a monopoly.[2] While this case arose under district rules before the statute, we apprehend the same conclusion would be reached under the statute, as the same reason controls.

§ 305. May protect tunnel by injunction.— The question has arisen several times as to how far the tunnel claimant might, and to what extent he should, protect the line of his tunnel against the encroachments of claimants of lodes discovered from or upon the surface; and it may be regarded as settled that the tunnel claimant may protect his inchoate rights by all proper remedies, including that of injunction.[3] Likewise, that the right of injunction will be extended to prevent the issuance of the patent.[4] But since even the issuance of a patent cannot prejudice the rights of the tunnel claimant, as the supreme court of the United States now holds,[5] it would seem that an injunction is wholly unnecessary. But it is believed that the principle which will support one in any case will prevent the removal of ore.

[1] Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471.

[2] Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198; s. c., 21 Cal. 548.

[3] Hope M. Co. v. Brown, 11 Mont. 370, 28 Pac. Rep. 782; Back v. Sierra Nevada M. Co., 2 Idaho, 385, 17 Pac. Rep. 83; Rico-Aspen Cons. M. Co. v. Enterprise M. Co., 58 Fed. Rep. 321; reversed for other reasons, 66 Fed. Rep. 200 (C. C. A.). For affirmance of this last case see 167 U. S. 108. See also Campbell v. Ellet, 167 U. S. 116, 42 L. ed. 101.

[4] Hope M. Co. v. Brown, *supra;* Back v. Sierra Nevada M. Co., *supra.*

[5] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 108.

§ 306. Summary — Construing the statute.— We have elsewhere intimated that this statute is capable of intelligent construction, when considered alone and as a special statute, limiting, to the extent of its provisions, the general statute. It is only when an attempt is made to read it in harmony with the general provisions relative to locations that trouble begins. And it must be confessed that the later decisions[1] have enhanced rather than diminished the difficulty. This decision did well to lay the ghost of restricted tunnel claims put forth by the early Colorado decisions, if that question remained of potential force after the Montana case[2] and the decision of the Colorado supreme court,[3] the latter of which politely refused to follow it. But beyond that it unsettled what was supposed to be the law requiring the marking of surface boundaries of claims discovered in a tunnel, and thereby extended the maze of difficulty as to where the tunnel claimant's rights terminate and those of his neighbors begin. For instance, we are correctly informed that the tunnel claimant has and may claim possession of the same length of the vein as if discovered from the surface; and that he may take any fifteen hundred feet thereof so that the claim so made will cross his tunnel; and that a notice at the mouth of his tunnel is sufficient to make this claim. To the uninitiated this may seem sufficient. But in realty it only sticks in the bark as compared with the magnitude of the real difficulty presented. It will rarely occur that the true strike of the vein can be given with mathematical precision, and yet, if the boundaries are not marked on the surface, this will be the only way of informing neighboring prospectors as to the true extent of the rights acquired by the reservation in favor of the tunnel claimant and of those acquired in virtue of his discovery.

The tunnel claimant has an enormous reservation of ter-

[1] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 108.

[2] Hope M. Co. v. Brown, 11 Mont. 370, 28 Pac. Rep. 732.

[3] Ellet v. Campbell, 18 Colo. 510, 33 Pac. Rep. 521.

ritory in his favor, and should be, as other claimants are, compelled to define the extent of his claim when his inchoate right or reservation becomes merged in a real and existing lode claim; this that the remaining territory to which his claim does not attach may be lawfully located by others. Moreover, this decision makes it necessary to insert in a patent another limitation and condition, namely, that the estate conveyed is liable to be divested by a tunnel claimant, prosecuting work with reasonable diligence upon a tunnel running in the direction of any vein contained within the patented area, and which was not known to exist at the date of the location of such tunnel; and upon the discovery of any such vein in such tunnel within three thousand feet from the mouth or "face" thereof. Or, if not this, then all the patent proceedings in the vicinity must be enjoined, as in the Montana and Idaho cases, until it can be determined whether the tunnel claimant has a superior right to the vein and the incident surface ground applied for; for it must be conceded that the words "same extent" apply as well to the surface as to the length of the vein. It would seem, therefore, that this portion of the decision will scarcely withstand the searchlight of reason and analysis; and that it must give way to that long standing, controlling principle of contemporaneous construction, in virtue of which it has always been considered necessary to mark upon the surface the boundaries of any claim discovered in a tunnel, in order to perfect the inchoate right.

CHAPTER III.

OF PLACER CLAIMS, THEIR DEFINITION AND SIZE; AND OF ALL FORMS OF DEPOSIT SO LOCATABLE.

§ 307. Introductory — General observations as to placer claims.
308. Placer claims — General and special definitions — The statute — What locatable as placer — Petroleum, gas, hydro-carbons.
309. Same subject — Of definitions merely, by the courts and standard authorities.
310. Same subject continued — Gold placer claims — Streaming, dredging, hydraulic mining — What included in term "placer mining" — Unnavigable river beds.
311. Asphaltum and other hydro-carbons locatable as placer.
312. The rule as to petroleum and natural gas.
313. Same — Grants and reservations in deeds — Petroleum held to be a mineral.
314. Building stone and lime stone.
315. Size of placer claims.

§ 307. Introductory—General observations as to placer claims.— The research made into the authorities in the previous sections of this work relative to minerals and mineral lands, and what classes of deposits were held and considered as such, and locatable as placers, will materially lessen our burdens at this time with reference to definitions. Stated generally and broadly, the plain and obvious meaning of the statute was to consider as placers, and to permit their location as such, all forms of metal and mineral-bearing earth not comprehended by and included in the term "rock in place."

The word "placer" itself, considered in a restricted sense, includes merely alluvial wash or gold gravel; but in an enlarged sense, and as used in the statute, congress provided that "claims usually called 'placers,' including all forms of deposit," might be located, evidently intending the term "placer" to have two meanings: first, the ordinary and re-

stricted meaning of gold gravel; and second, all other forms of mineral or metallic deposits not included in or comprehended by gold gravel or rock in place. This latter definition, as we shall see further on in this chapter, has been extended to and held to include, and we think correctly, petroleum and natural gas, and all forms of hydro-carbons.

§ 308. Placer claims—General and special definitions—The statute—What locatable as placer—Petroleum, gas, hydro-carbons.—It will thus be seen that the statute with reference to locating and defining placer claims is broad and comprehensive. It defines "placer" to be any form of valuable deposit except quartz or other rock in place.[1] This question has been before the courts of last resort in the states of California, Colorado and Montana and the supreme court of the United States many times, and while they may not agree exactly, in mere verbal phrase, as to what is comprehended and included by the term "placer and other deposits," as referred to in the statute, they agree substantially with our definition of the term "placer" as given in the last preceding section; and that the statute was intended to include and authorize the location of, not only auriferous gravel, but all forms of deposit not included within the term "rock in place."[2] It may be said to be settled by the courts and the land department that in a general sense the term "placer," as employed in the statute and defined by the courts and by the land department, in its enlarged sense, authorizes the location as such, of all forms of mineral and metal-bearing earth, including natural gas, petroleum and hydro-carbons, and not included or un-

[1] R. S. U. S., § 2329.

[2] United States v. Iron Silver M. Co., 128 U. S. 673; Tucker v. Masser, 118 U. S. 203; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Reynolds v. Iron Silver M. Co., 116 U. S. 687; Moxon v. Wilkinson, 2 Mont. 421, 12 M. R. 602; Poire v. Wells, 4 Colo. 406; Poire v. Leadville Imp. Co., id. 413; Prosser v. Parks, 18 Cal. 47; Gregory v. Pershbaker, 78 Cal. 109, 14 Pac. Rep. 401; Mitchell v. Cline, 84 Cal. 409, 24 Pac. Rep. 164.

derstood by the terms "rock in place" or "cinnabar deposits."[1]

§ 309. Same subject — Of definitions merely, by the courts and standard authorities.— While we have outlined the general meaning of the term "placer," as intended by Congress and understood by the courts, some of the observations of the courts in special cases may assist both practitioner and student, and are therefore reproduced. We quote now from the supreme court of California: "In Seane's. Neuman and Barretti (by Valazquez), a 'placer' is said to be 'a place near the bank of a river where gold dust is found.' In the last edition of Webster, which gives the meaning of the term as approved by usage in Mexico and California, it is defined: 'A gravelly place where gold is found, especially by the side of a river, or in the bed of a mountain torrent.' Whatever the origin of the subterranean channels containing gravel dust, they have long been known to exist in California, and they have been generally supposed to be, and generally spoken of as, the beds of ancient rivers in which the gravel was deposited by fluvial action, and which were either from their beginning subterranean, or upon which the superincumbent earth or rock has been hurled by means of convulsions caused by volcanic or other natural force. That the bed of gravel mentioned in the findings, to the limited extent it has been prospected by the intervenor's tunnel, 'descends or drops on an average of about eight degrees,' does not of itself make the gravel deposits a lode with 'a top or apex,' nor contradict the theory that the channel was a mountain stream or torrent."[2]

Finding No. 51 of the lower court, reported in the opinion in this case, among other things contains this matter: "In

[1] Van Doren v. Plested, 16 L. D. 508; Secretary Teller to Com'r McFarland, Re Dobb's Placer, 1 L. D. 565; Re Chas. A. Barnes, 7 L. D. 66; Shepherd v. Bird, 7 L. D. 82; Downey v. Rogers, 2 L. D. 707; Phifer v. Heaton. 27 L. D. 57; Forsythe v. Weinzert, 27 L. D. 680; Beaudette v. N. P. R. Co., 29 L. D. 248; Tulare Oil & M. Co. v. S. P. R. Co., 29 L. D. 269; Schrimpf v. N. P. R. Co., 29 L. D. 327.

[2] Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. Rep. 401.

the year 1856, John Barrett and others associated with him discovered . . . a thin seam of gravel cropping out between an underlying bed of slate rock and an overlying bed of lava rock." The court called this a placer deposit, presumably because it was a gravel bed at the bottom of an ancient river, but it would seem to us that the description in the findings of a seam of gravel between a hanging wall of lava and a foot wall of slate, more nearly describes a lode. The supreme court of the United States say: "By the term 'placer claim' is meant ground between defined boundaries which contains mineral earth, sand or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in loose state, and may in most cases be collected by washing or amalgamation without milling."[1]

In another case, placer mines are defined as those in which minerals are found in softer material, which covers the earth's surface, not among the rocks beneath.[2]

Another definition of placers is given by the supreme court of Montana as superficial deposits which occupy the beds of ancient rivers or valleys.[3]

The Century Dictionary says "it is a place near a river where gold dust is found. In mining, a place where the superficial detritus is washed for gold or other valuable minerals; a word formerly in use in California, but now nearly obsolete. Placer mining has hardly any other meaning in English than that of gold washing, but it is not used in speaking of washing for gold by the hydraulic method. Washing for tin (a kind of mining not carried on in the United States) is called 'streaming.'"[4]

§ 310. Same subject continued — Gold placers claims — Streaming, dredging, hydraulic mining — What included in term "placer mining" — Unnavigable river beds. — From the foregoing it will appear that gold placer is the

[1] United States v. Iron Silver M. Co., 128 U. S. 673.

[2] Reynolds v. Iron Silver M. Co., 116 U. S. 687.

[3] Moxon v. Wilkinson, 2 Mont. 421.

[4] Cent. Dict., vol. 16, title "Placer."

foundation of the legislation authorizing the acquisition of title to all manner of mineral-bearing earth not *in situ* in this country. No provision was made in the law of 1866 with reference to this subject. The first legislation is found in what was known as the placer mining law of 1870.[1] Gold placer being the highest type, viewed from the standpoint of values, of mineral or metal-bearing earth not *in situ*, naturally formed the nucleus around which was gathered the law with reference to all other forms of placer or valuable deposit.

Until very recent years, too, gold placer furnished the subject of nearly all the litigation upon this branch of mining law. Lately, however, all forms of placer mining claims, from stone lands to petroleum and gas lands, have received their quota of attention, not only in the precious-metal-bearing states, but elsewhere throughout the Union.

Gold placer mining is the only species of mining which accurately embraces the term "placer mining." It is similar to streaming, as understood in the English law.[2] It includes not only the washing of gravel banks by hydraulic mining, which is the application of water under pressure, but also the ordinary pick and shovel and sluice box and gold pan, and likewise the dredging of river beds and all other forms of subaqueous mining by means of dredges for the purpose of obtaining free gold or precious stones. Whence it follows that all lands, whether covered by water or not, with the possible exception of navigable river beds, upon which mining, by any of the placer processes as herein described, for gold or other precious metals or minerals is carried on, are placer lands and are locatable as such.[3]

It has been expressly decided by the Supreme Court of the United States, under circumstances which are controlling in this matter, that if the land contains gold or other valuable deposits in loose earth, sand or gravel, it is enter-

[1] Act of July 9, 1870, 16 Stat. at L. 217, § 12.

[2] McSwinney, Mines, pp. 384, 434; Rogers v. Brenton, 10 Q. B. 26; Gaved v. Martyn, 19 C. B. (N. S.) 732.

[3] William Rablin, 2 L. D. 764.

able under the placer mining laws, regardless of other valuable qualities it may possess, such as timber or other uses, besides mining, to which it may be put. But the ground must contain deposits of gold or other valuable deposits in order to be so located.[1]

Mining under hydraulic process is not of itself unlawful, but highly useful and commendable when properly conducted without injury to the property or rights of others;[2] and it is now settled in the land office "that if the beds of unnavigable streams contain mineral deposits they may be appropriated for mining purposes."[3] This would include all unnavigable lakes and ponds, and neither are navigable unless used for water transportation as a commercial highway.

§ 311. Asphaltum and other hydro-carbons locatable as placer.— The provision of the statute, "all other forms of deposit locatable as placer," would seem to be broad enough to cover, as indeed it was intended to do, all forms of mineral substances not in place. Both before and after the enactment of this statute, and in the original thirteen states where it has no application, grave doubts have been entertained as to whether petroleum and gas, as also asphaltum and other hydro-carbons, were minerals in the sense that they were included, by that term, in a deed conveying or reserving minerals. The different substances which may be located as mineral, and which have been treated as such by the land department and the courts, have been fully discussed in a previous chapter of this work,[4] and any extended examination of the subject here would be repetition. It may be stated here, however, that any of the substances which have been classed by the land department as mineral, including asphaltum and all similar deposits not in place, may be located as placer.[5]

[1] United States v. Iron Silver M. Co., 128 U. S. 673.

[2] United States v. North Bloomfield Gravel M. Co., 81 Fed. Rep. 243.

[3] William Rablin, 2 L. D. 764 (Rablin's Placer).

[4] *Ante*, § 148.

[5] See *ante*, § 148. See also Downey v. Rogers, 2 L. D. 707; Conlin

§ 312. The rule as to petroleum and natural gas.—We have already observed[1] that there has been much contrariety of opinion as to whether petroleum and natural gas are minerals. The courts, with few exceptions,[2] have held that these substances are minerals and locatable as such.[3] The land department has been on both sides of the question, but the matter is finally set at rest by the act of congress which reads as follows: "Any person authorized to enter lands under the mining laws of the United States may enter or obtain patent to lands containing petroleum or other mineral oil, and chiefly valuable therefor, under the provisions of the laws relating to placer and mineral claims."[4]

§ 313. Same—Grants and reservations in deeds—Petroleum held to be a mineral.—The supreme court of Tennessee in a case decided in November, 1897, after the enactment of the statute just cited,[5] but making no reference to it, where the question to be decided was whether petroleum was a mineral, as contemplated by the parties in a deed reserving to the grantor "all mines, minerals and metals in and under the land," after carefully examining numerous cases upon the subject, finally disposed of the question in this language:

"The first question to be determined is whether petroleum oil is included within the language of reservation of 'mines, minerals and metals.' (After citing Century Dictionary.) . . . Clearly, from this description of the substance, it could not in any sense fall under the terms 'metal' or 'metallic.' The question, then, to be determined is, does it fall within the term 'mines and mineral'? . . . In the most general sense of the term, minerals are those parts of

v. Kelly, 12 L. D. 1; Maxwell v. Brierly, 10 C. L. O. 50; Gesner v. Gas Co., 1 James (Nova Scotia), 72; H. P. Bennett, Jr., 3 L. D. 116.

[1] *Ante*, § 148.

[2] Dunham v. Kirkpatrick, 101 Pa. St. 36, 47 Am. Rep. 696.

[3] See notes to § 313, *post*.

[4] Act approved Feb. 11, 1897, 29 Stat. at L. 526; 2 Supp. R. S. U. S. p. 549.

[5] Note 4, *ante*.

the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metals, ores of all kinds, clay, stone, slate and coprolites. . . . The term is not limited to metallic substances, but includes salt, coal, paint, stone and similar substances. . . . We think, however, that the true meaning of the word 'mineral,' as well as its meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word 'mineral' applied only to metals."[1]

After citing several cases from Pennsylvania and other courts, the court concludes: "We are bound to hold that petroleum is a mineral and that it falls within the terms of the reservation in the deed. . . . The same is true of natural gas."

The supreme court of Pennsylvania, upon this question, say: "It (petroleum) is a mineral substance obtained from the earth by a process of mining, and land from which it is obtained may with propriety be called mineral land."[2]

The same court, in an earlier case, defined it thus: "Oil is a mineral, and, being a mineral, is part of the realty."[3]

The supreme court of West Virginia uses substantially the same language in defining petroleum and mineral oil.[4] And lands chiefly valuable for petroleum are not subject to selection as indemnity, under a railroad grant reserving minerals.[5]

[1] Murray v. Allard, 100 Tenn. 100, 43 S. W. Rep. 355, 39 L. R. A. 249, 250, 253, citing Cent. Dict., title "Petroleum," 2 Rapalje & L. Law Dict., p. 821; Midland R. Co. v. Checkley, L. R. 4 Eq. 19; Hext v. Gill, L. R. 7 Ch. 629; Atty. Gen. v. Tomline, L. R. 5 Ch. Div. 762.

[2] Gill v. Weston, 100 Pa. St. 313. See also Henry v. Lowe, 73 Mo. 96; Brown v. Vandergrift, 80 Pa. St. 147, 148.

[3] Funk v. Haldeman, 53 Pa. St. 229, 249; Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. St. 235, 5 L. R. A. 781.

[4] Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222, 232.

[5] Union Oil Co. (on review), 25 L. D. 351.

§ 314. Building stone and lime stone.— The question as to whether deposits of building stone and lime stone are locatable as placer has provoked considerable discussion by the courts. The supreme court of Washington, in a case decided prior to the passage of the act of congress,[1] held that land containing a deposit of lime stone entirely devoid of ore cannot be located as a mining claim, either lode or placer.[2]

The supreme court of Montana, on the other hand, held that a stone quarry might be located and patented as a placer claim under the provisions of the Revised Statutes of the United States,[3] and this latter position, which would seem to be the sounder in principle, is supported by the supreme court of New York.[4] The matter has been finally set at rest, however, so far as the public-land states are concerned at least, by act of congress, which provides, "That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims."[5]

§ 315. Size of placer claims.— The statute provides that no location made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons.[6] The next succeeding section provides that no such location shall include more than twenty acres for each individual claimant.[7] These provisions of statute have been construed by the land department to mean that after the 9th day of July 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the rules of the district may provide. And that after May

[1] Act approved August 4, 1892, 27 Stat. at L. 348; 2 Supp. R. S., p. 65.

[2] Wheeler v. Smith, Puget Sound Lime Co., Intervenor, 5 Wash. St. 404, 32 Pac. Rep. 784.

[3] Freezer v. Sweeney, 8 Mont. 508, 21 Pac. Rep. 20.

[4] Brady v. Brady, 65 N. Y. S. 621.

[5] Act of August 4, 1892, *supra*.

[6] R. S. U. S., § 2330.

[7] Id., § 2331.

10, 1872, no placer location may include more than twenty acres for each individual participating therein.[1]

In the Dominion of Canada there are separate and distinct provisions in each of the provinces regulating the size and shape of placer mining claims. The substance of these statutes will be found in a foot-note.[2]

[1] Circular of Gen. Land Office, June 24, 1899, p. 23, par. 35; Union Oil Co. (on review), 25 L. D. 351, 359; Circular of Instructions, Dec. 9, 1882, 1 L. D. 695; McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. Rep. 668.

[2] *Size of placer claims in Canada:* In the Province of British Columbia placer claims are divided into five classes: "Creek Claims," which shall be 100 feet long, measured in the direction of the general course of the stream, and shall extend in width from base to base of the hill or bench on each side, but when the hills or benches are less than 100 feet apart the claim shall be 100 feet square.

"Bar Diggings," which shall consist of a strip of land 100 feet long at high-water mark, and in width extending from high-water mark into the river to its lowest water level.

"Bench Diggings," which shall be 100 feet square; provided that the Gold Commissioner shall have authority, where a bench is narrow, to extend the limits of the claim beyond the limits of the bench, but not to exceed 100 feet square.

"Dry Diggings," which shall be 100 feet square.

"Hill Diggings," which shall have a base line or frontage of 100 feet down parallel to the main direction of the stream or ravine on which it fronts. Sec. 16, ch. 136, act relating to placer mines (as amended in 1898 and 1899), R. S. 1897, ch. 136.

Manitoba: In unsurveyed territory mining locations must be rectangular in shape, with the boundary lines running due north and south and east and west astronomically; and must be one of the following dimensions, namely: 80 chains in length by 40 chains in width, containing 320 acres, or 40 chains square, containing 160 acres, or 40 chains in length by 20 chains in width, containing 40 acres. Where such mining locations border upon a lake or river, a road allowance of one chain in width is reserved along the margin thereof. And the width of the location shall front on such road allowance, and the other boundaries shall be due north and south and east and west astronomically. The Provincial Land Commissioner is given the authority to direct that such reservation be not made in case of any island containing not to exceed twenty acres. Sec. 7, The Mines Act 1897 (ch. 17), Laws of Manitoba, 1897. In surveyed townships they are divided into lots of a quarter, an eighth, or a sixteenth of a section each. Id.

These same provisions control in the province of Ontario. Sec. 26, R. S. Ontario 1897, ch. 86, as amended by 61 Vict., ch. 11, and 62 Vict., ch. 10, Mines Act.

Provisional District of Yukon: A creek or gulch claim shall be 250 feet long, measured in the general direction of the creek or gulch, and shall not in any case exceed 1,000 feet in width on each side of the center of the stream or gulch.

The river claim shall be situated only on one side of the river and shall not exceed 150 feet in length, measured in the general direction of the river; and shall be not less than 250 feet and not more than 1,000 feet in width from the low-water mark of the river.

Hill claim shall not exceed 250 feet in length parallel to the main direction of the stream or ravine which it fronts, and shall not be to exceed 1,000 feet wide.

All other placer claims shall be 250 feet square. §§ 10 to 14, inclusive. Regulations approved by Order in Council of January 18, 1898.

Quebec: Mining claims, or "concessions," in unsurveyed lands are divided into three classes: The first class contains 400 acres (52 chains in width by 80 chains and 80 links in depth). The second class contains 200 acres (26 chains in width by 80 chains and 80 links in depth). The third class contains 100 acres (13 chains in width by 80 chains and 80 links in depth).

In surveyed townships these classes respectively comprise one, two and four lots, as regularly divided, or more or less, as the case may be, if such lots, being of irregular form, contain more or less than one hundred acres each, in superficies. § 5 (1436), Quebec Min. Law of 1892, 55 and 56 Vict., ch. 20.

But no sales of mining concessions containing more than 400 acres in superficies shall be made to the same person; provided the lieutenant-governor in council may grant the right to any person, upon sufficient proof of his capital and resources, a larger extent of territory, but not in any case to exceed 1,000 acres. Id., sec. 7 (1443).

New Brunswick: Placer or alluvial mines shall be laid out, as far as local peculiarities will allow, in areas of 150 feet lengthwise of the general course of the strata by 250 feet across. §§ 10 and 11, Mines Act, passed 16th April, 1891.

Nova Scotia: All mines of gold and silver shall hereafter be laid off in areas of 250 feet in length, true meridian north and south, and 150 feet east and west. Areas shall be laid out, as far as possible, uniformly and in quadrilateral and rectangular shapes. Surface measurements shall be horizontal, and each area shall be bounded by vertical planes passing through the horizontal surface lines. §§ 10 and 12, ch. 1, Act 1892, entitled "An act to amend and consolidate the acts relating to mines and minerals."

Section 1 of Act of 11th March, 1898, amendatory of the foregoing, gives the commissioner of public works and mines power, upon proper application in writing, to grant an area of 500 acres to be divided into class No. 1 claims, viz., 250 by 150 feet in size, for the purpose of alluvial gold mining only, upon conditions therein contained.

CHAPTER IV.

OF LODE AND PLACER CLAIMS IN THE SAME GROUND.

§ 318. Preliminary — Rights of locator of placer claim which contains a lode.
319. Manner of locating lodes within placers.
320. Width of lode locatable in placer ground.
321. Same — The rule where a lode is located before placer.

§ 318. Preliminary — Rights of locator of placer claim which contains a lode.— The statute has recognized what the experience of the miner has proved, that it not infrequently occurs that a placer claim may also contain a lode within its boundaries.[1] In such case each should be located by itself, a separate estate being created in each.[2] The location of a placer claim carries with it no rights to a lode existing therein and known to exist at any time before patent.[3] The lode so existing may be claimed and located either by the placer claimant himself or by another locator. Therefore, where such lode is known to exist within the boundaries of the placer at the date of its location, or at such subsequent date as it is discovered, the placer claimant should, in order to protect his rights, if he desires to hold such lode, at once locate and mark the boundaries thereof, as in the case of any other lode location. Failure on his part to do this leaves the lode subject to location by another, regardless of the possession of the placer within which it is contained.[4]

[1] R. S. U. S., § 2333.

[2] Id.; Land Office Circular of June 24, 1899, § 32, p. 23; Noyes v. Mantle, 127 U. S. 348; Iron Silver M. Co. v. Reynolds, 124 U. S. 374.

[3] *Post*, §§ 666 *et seq.*

[4] Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95; Reynolds v. Iron Silver M. Co., 116 U. S. 687; Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 56 Pac. Rep. 176, 50 L. R. A. 289; McCarthy v. Speed,

§ 319. Manner of locating lodes within placers.— Except as to the question of the amount of surface ground which may be claimed in connection with a lode discovered within the boundaries of a placer claim, the requirements of a valid location of such lode, and the manner of making it, are in all respects the same as in the case of a lode discovered in ground wholly unappropriated.[1] Under the provisions of the statute,[2] however, the holder of a placer claim containing a lode within its limits may proceed to patent the lode within the placer, without having previously located the same, by virtue of the mere possession thereof on his part, provided it has not, in the meantime, been located by another, which location is still valid and in force.[3] The reason of this rule is obvious: since the purpose of location is to publicly lay claim to and assert dominion over, with the view of holding, working and patenting, it is sufficiently accomplished by the placer location.

§ 320. Width of lode locatable in placer ground.— The question as to how much surface ground may be located within a placer has never been definitely settled. It has only come before the courts or the department in two ways: First, upon application for the placer, the lode being either insufficiently excepted, or adverse proceedings being instituted by the lode against the placer; and second, upon suit after patent by the owner of the "known lode," which is excepted by law out of the placer patent.

In these cases it seems definitely settled that the lode claimant (especially if the lode claim is made after the placer) is only entitled to twenty-five feet on each side of the center of the vein. This matter will be more fully considered hereafter under the head of Application for Patent.[4] It would seem to follow from the statute and the

11 S. Dak. 362, 50 L. R. A. 184, 77 N. W. Rep. 590; R. S. U. S., § 2333; Land Office Circular, June 24, 1899, § 32.

[1] Upon the subject of a valid location generally, see *post*, Part VII.

[2] R. S. U. S., § 2333.

[3] See *post*, § 666 *et seq.*; Circular of General Land Office, June 24, 1899, p. 23, § 32.

[4] *Post*, Part X, ch. II.

logic of the situation, since the placer patentee, if he applies for both lode and placer, takes fifty feet of surface ground with his lode, and the remainder as placer, the locatable width of a lode claim within a placer must be limited to that width.[1]

In a case in Colorado which falls within the second class above mentioned and just cited, this question was elaborately discussed by the supreme court, and in the course of the opinion occurs the following logical statement of the law: "Another and more serious question is presented, and that is the amount of surface ground appellee is entitled to under and by virtue of his lode locations. The court below awarded him the full amount claimed, to wit, 300 by 1,500 feet, in each of the claims. It is insisted by counsel for appellant that he is entitled to only the mineral lodes and not to any of the surface of the placer ground. . . . Why should there be any difference between the rights of claimants of known lodes within the boundaries of a placer? We know of none. The object of excepting known lodes from placer locations was to prevent titles to such lodes being obtained under the guise of a placer; at the same time, in order to protect claimants to each character of mineral locations to the greatest extent, and preserve to each that which was most valuable for particular purposes in connection with each class of claims. The lode, for convenient working, could not be limited to less than twenty-five feet on each side of the center of the vein; and the placer, which would be valueless without such surface rights, is permitted to take title to the remaining area accordingly. . . . The government receives for its mineral lands the price fixed for lodes and placers respectively, and the superior right to the surface area of the placer claimant, acquired by his prior location or patent, is protected. It is

[1] Noyes v. Mantle, 127 U. S. 348; Shonbar Lode, 1 L. D. 551, 8 L. D. 388; Pike's Peak Lode, 10 L. D. 200; Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95. See also Reynolds v. Iron Silver M. Co., 116 U. S. 687; Searl v. Finn, 10 C. L. O. 119.

the conclusion of a majority of the court that the limitation of the width of a lode claim in section 2333 is not only applicable to the placer claimant, but applies as well to others who locate a lode within the boundaries of his previously located placer. . . . It follows that the court below erred in adjudging to appellee surface ground in excess of twenty-five feet on each side of the lodes in question." [1]

§ 321. Same — The rule where a lode is located before placer. — The discussion in the last section has reference entirely to the case of a lode located by another than the placer claimant, within the limits of the placer claim, after the location of the placer and while it is still in force. Where the lode is located before the placer, there is no good reason why the locator would not be entitled to hold the full-sized lode claim, since "the section [2] can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for . . . such locations, when perfected under the law, are the property of the locators, or parties to whom the locators have conveyed their interest;" [3] the only condition to such location being, that he discover mineral in rock in place within the limits of his claim. In such case it would seem to follow that the locator of a placer claim, conflicting with the lode, would only be entitled to so much of the ground as was not already claimed by the lode.[4] If it should so happen that the placer claim is only

[1] Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 50 L. R. A. 289, 56 Pac. Rep. 176. See also cases cited, note 1, *ante*, p. 291; Moyer v. Mike & Starr G. & S. M. Co., 10 C. L. O. 150; *ante*, § 280.

[2] R. S. U. S., § 2333.

[3] Noyes v. Mantle, 127 U. S. 348; Sullivan v. Iron Silver M. Co., 143 U. S. 431.

[4] Noyes v. Mantle, *supra;* Reynolds v. Iron Silver M. Co., 116 U. S. 687; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Sullivan v. Iron Silver M. Co., *supra;* Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 56 Pac. Rep. 176, 50 L. R. A. 289 and note; Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

for twenty acres by a single individual, on unsurveyed land, or that the legal subdivision, where the land has been surveyed, should run in substantially the same direction as the lode location (something not likely to occur, yet not impossible), there would be a virtual conflict of the entire claim, when the existence of a lode of rock in place within the boundaries of the lode location would be the sole question for decision. But where the placer claim is for one hundred and sixty acres by an association of persons, it can be readily seen that it could be so located as to entirely surround the lode location. In either case we think there is no question but that, where the lode is located before the placer, and is predicated upon the discovery of mineral in rock in place within its limits, its locator would be entitled to the full width of his claim as allowed by United States, state or district laws.[1]

[1] See notes 3 and 4, *ante*, p. 292.

CHAPTER V.

OF MILL SITES.

§ 324. How and for what purposes mill sites may be located.
325. Different kinds of mill sites — Acts necessary to hold.
326. Must be worked in connection with mine or mill.

§ 324. How and for what purposes mill sites may be located.— The statute authorizes the location, by the owner or proprietor of a lode or placer claim, of non-adjacent surface ground, not to exceed five acres, as a mill site. Such mill site must be non-mineral in character, and shall be paid for at the same rate as lode claims. The owner of a quartz mill or reduction works may locate not to exceed five acres as a mill site, even though he does not own a mine in connection therewith.[1] This statute has been construed to allow a mill-site claimant to select more than one tract of land as a mill site, provided the aggregate does not exceed five acres.[2] The manner of locating a mill site is in all respects similar to the manner of locating a lode or placer claim so far as regards the posting of notice and marking of boundaries. The notice of location of a mill site should, in addition to giving the boundaries and extent of the claim, also state that the ground is non-mineral in character.[3] In states where there are statutory provisions on the subject, provision is generally made for the manner of locating and recording

[1] R. S. U. S., § 2337; Rico Townsite, 1 L. D. 556; Alta Mill Site, 8 L. D. 195; Circular of Gen. Land Office, June 24, 1899, p. 30, §§ 66, 67; Com'r Drummond to Central City (Colorado) Office, July 29, 1872, Copp's Min. Lands, p. 88; Mongrain v. N. P. R. R. Co., 18 L. D. 105.

[2] J. B. Haggin, 2 L. D. 755; Hecla Cons. M. Co. 12 L. D. 75.

[3] Hartman v. Smith, 7 Mont. 19, 14 Pac. Rep. 648; Valcalda v. Silver Peak Mines, 86 Fed. Rep. 90, 29 C. C. A. 591.

mill sites, and where there are such provisions they should be carefully observed.[1]

§ 325. Different kind of mill sites — Acts necessary to hold.— The obvious meaning of the statute is that a mill site may be located upon non-mineral land by the owner of a mine not contiguous thereto, or by the owner of a quartz mill or reduction works even though he does not own a mine in connection with it.[2] But the owner of such mill site must either own a mine, mill or reduction works, or use his mill site in some way beneficial to the working of his mine. He is entitled to possession, and to have that possession protected, just to the extent that he has actually and in good faith prosecuted labor in that direction, and no longer. But it has been held in this connection that the building on the land of a pumping plant to carry water to the mine,[3] the use of the same for the purpose of constructing a storage reservoir thereon to maintain a water supply for the mine,[4] or for depositing tailings, or for shops or houses for his workmen,[5] is a sufficient mining use to amount to a compliance with the statute. The circuit court of appeals for the ninth circuit in a recent case has held that the locator of a mill site, who has caused the corners thereof to be marked by posts, has a house and stable thereon, and who has made certain excavations thereon to increase the flow of water from springs, and has also built a wagon road across it to his mine, has sufficiently complied with the law to entitle him to maintain ejectment proceedings against a trespasser.[6]

[1] Hartman v. Smith, *infra;* Valcalda v. Silver Peak Mines, *infra.* For a summary of the state statutes see Appendix B.

[2] Valcalda v. Silver Peak Mines, 86 Fed. Rep. 90, 29 C. C. A. 591; Hartman v. Smith, 7 Mont. 19, 14 Pac. Rep. 648.

[3] Sierra Grande M. Co. v. Crawford, 11 L. D. 338; Gold Springs & Denver City Mill Site, 13 L. D. 175.

[4] Gold Springs & Denver City Mill Site, *supra.*

[5] Chas. Lennig, 5 L. D. 190, 192; Hartman v. Smith, *supra.*

[6] Valcalda v. Silver Peak Mines, *supra.*

§ 326. Must be worked in connection with mine or mill. By the enactment of this section of the statute congress undoubtedly intended that the locator of a mill site must hold the same in one of the two ways therein pointed out, and must work it in connection with his mine, or must own and operate mills and reduction works, or some other improvements necessary for the convenient working of his mine thereon. Of course no iron-clad rule as to the amount of work necessary to constitute a compliance with the statute can be laid down; the matter must be left for determination under the peculiar facts in each particular case. As said by the supreme court of Montana: "We cannot say, under this statute, what shall be the extent of the use,—whether much or little,—or the particular character of the use. The phrase 'mining purposes' is very comprehensive and may include any reasonable use for mining purposes which the quartz-lode mining claim may require for its proper working and development. This may be very little or it may be a great deal. The locator of the quartz-lode mining claim is required to do only a hundred dollars' worth of work each year until he obtains a patent therefor. But if he does only this amount and uses the mill site in connection therewith, is not this the use of a mill site for a mining purpose in connection with the mine? Who shall prescribe what shall be the kind and extent of the use under this statute so long as it is used in good faith in connection with the mining claim for a mining purpose?"[1]

In addition to the requirement that the mill site be held in connection with the mine, or that mills or other proper buildings be constructed upon it, it is also necessary and essential that it be held by the real party in interest, that is, not by one person for the benefit of somebody else.[2] But

[1] Hartman v. Smith, 7 Mont. 19, 14 Pac. Rep. 648.

[2] Hamburg M. Co. v. Stephenson, 17 Nev. 449. And where land is merely held for the purpose of securing the water thereon and is not improved or occupied for mining or milling purposes, it may not be appropriated for a mill site. Cyprus Mill Site, 6 L. D. 706; Mint

it is not necessary that application for patent for the mine be made before location of the mill site.[1]

Lode and Mill Site, 12 L. D. 624. See also Two Sisters Lode and Mill Site, 7 L. D. 557. In the Nevada case, *supra*, p. 296, it appeared that plaintiff had *located* a ranch, if such a thing is possible, and that defendant had sought to locate a mill site over it. No mine or mill seems to have been owned in connection with this mill site, nor does the ranch owner seem to have held one in connection with his "farm," so that, as an abstract proposition of law, there is not very much in the case.

[1] Hargreve v. Robertson, 15 L. D. 499. As to patent for mill sites, see *post*, § 671.

CHAPTER VI.

OF WATER RIGHTS.

§ 329. Water rights generally — Extent of discussion here.
330. Water rights under the statute — Nature of estate in — Beneficial use — First in time, *stronger in right.*
331. Percolating waters — Part of soil — Owner of soil not liable for diversion of.
332. Distinction between percolating waters and underground currents.

§ 329. Water rights generally — Extent of discussion here.— The question of water rights, except in so far as it relates exclusively to mining, is not a proper subject for discussion in a work of this kind. In this part of our work we will devote ourselves exclusively to a discussion of the question of the rights of the miner to appropriate water for use about his mine or mill, as conferred upon him by statute;[1] and his right to appropriate and use percolating waters, developed or discovered by him while prosecuting work in his shaft, tunnel or other mining excavation. This discussion, it will be observed, treats water as a necessity. There are times, however, when it proves to be an enemy, and damages are claimed by one person against another for allowing his water to flow upon and do damage to the property of the other. This question will be discussed in a future chapter.[2]

§ 330. Water rights under the statute — Nature of estate in — Beneficial use — First in time, stronger in right.— The statute upon this question reads as follows: "That whenever, by priority of possession, rights to the use of water for mining, . . . or other purposes, have accrued, and the same are recognized and acknowledged by

[1] R. S. U. S., § 2339. [2] *Post*, Part XII, ch. VII.

the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be protected in the same, and the right of way for the construction of ditches and canals for the purposes aforesaid are hereby acknowledged and confirmed. . . ."[1] This statute has been construed as recognizing vested rights, and of impressing the public lands with an easement for the purposes mentioned, subject to which easement the locator acquires his title to property forming a part of the public domain.[2]

This question includes the well-settled rule that he who first appropriates water and puts it to a beneficial use, to the extent so used, whether for hydraulic mining or for propelling machinery, acquires a superior right to it, to the extent that he has put it to a beneficial use, to the exclusion of any other appropriator,[3] whether the same is conveyed to his property through surface or subsurface channels;[4] and he is entitled to have it flow without material interruption,[5] and is protected from damage by subsequent locators above or below him;[6] and where he has diverted it for a particular claim, he may afterwards change the place of diversion, so as to use it on another claim, without losing his priority of right.[7]

Discussing this statute the United States supreme court say: "We are of opinion that it is the established doctrine of this court that rights of miners, who had taken posses-

[1] R. S. U. S., § 2339; 14 Stat. at L. 253.

[2] Broder v. Natoma Water Co., 101 U. S. 274; Jennison v. Kirk, 98 U. S. 453; Forbes v. Gracy, 94 U. S. 762; Basey v. Gallagher, 87 U. S. 452. And he has the right to appropriate it through natural channels or by artificial means. Hoffman v. Stone, 7 Cal. 46. And the doctrine of riparian rights does not apply. Atchison v. Peterson, 20 Wall. 507, 87 U. S. 414.

[3] Ortman v. Dixon, 13 Cal. 33.

[4] Jennison v. Kirk, *supra;* Broder v. Natoma Water Co., *supra;* Hobart v. Ford, 6 Nev. 77. See also Barnes v. Sabron, 10 Nev. 217; Ezmond v. Chew, 15 Cal. 137.

[5] Bear River & Auburn W. & M. Co. v. New York M. Co., 8 Cal. 327.

[6] Hill v. King, 8 Cal. 336; Hill v. Smith, 27 Cal. 476; Suffolk G. M. & M. Co. v. San Miguel Cons. M. & M. Co., 9 Colo. App. 407, 48 Pac. Rep. 828.

[7] Davis v. Gale, 32 Cal. 26.

sion of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations, . . . are rights which the government had by its conduct recognized and encouraged and was bound to protect before the passage of the act of 1866, and that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."[1]

The supreme court of Utah recognized this rule to the extent of allowing a person who dug out a spring on public land to the depth of two or three feet, from which he obtained a fair flow of water, to hold the waters flowing from such spring or well to the exclusion of subsequent locators of the ground upon which it is situated.[2]

The statute of Oregon[3] classes interests in ditches for mining purposes as real estate, and the supreme court of that state, in construing this section, has held, what would seem to be a logical construction of it, that, such rights being real estate, interests in them can only be conveyed by deed.[4]

§ 331. Percolating waters part of soil — Owner of soil not liable for diversion of. — It is a well-settled rule of law that percolating water is a part of the soil and belongs to the owner thereof. The water of wells, as also that tapped in a tunnel, shaft or incline, is generally classed under this head.[5] It is well settled in this country that the mine owner, who in the due course of mining, and without malice or negligence, taps and drains or decreases the flow of underground channels supplying the spring upon adjoining lands, is not liable to any other party whose spring is thus de-

[1] Broder v. Natoma Water Co., *ante*, p. 229, note 2.

[2] Sullivan v. Northern Spy M. Co., 11 Utah, 438, 40 Pac. Rep. 709.

[3] Hill's Annotated Code of Oregon, § 3833.

[4] Mattis v. Hoamer (Oreg.), 62 Pac. Rep. 17.

[5] Sullivan v. Northern Spy M. Co., 11 Utah, 438, 40 Pac. Rep. 709; Acton v. Blundell, 12 M. & W. 324.

stroyed.[1] As said by the supreme court of Pennsylvania: "Percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly, the law has never gone so far as to recognize in one man a right to convert another's farm to his own use for a filter. Such a claim, if sustained, would amount to a total abrogation of the rights of property. . . ."[2] And again: "The proprietor of land may, in the proper use of his land for mining, . . . or any other useful purpose, cut off or divert subterraneous water flowing through it to the land of his neighbor without any responsibility to that neighbor."[3]

It would seem well settled, then, that for the diversion of percolating water, in the ordinary course of mining, the mine owner is not liable so long as he pursues his mining operations in a legitimate manner, even though he may destroy his neighbor's well or spring. In such case the injury done his neighbor is *damnum absque injuria*.[4]

§ 332. Distinction between percolating waters and underground currents.— Distinction has been sought to be made between underground percolating water and water flowing through an underground current;[5] the authorities generally holding that while a party who destroys the flow of his neighbor's well, by diverting percolating waters under-

[1] Haldeman v. Bruckhart, 45 Pa. St. 514; Chase v. Silverstone, 62 Me. 175; Roath v. Driscoll, 20 Conn. 533; Mosier v. Caldwell, 7 Nev. 363. Compare Herriman Irr. Co. v. Butterfield M. Co., 19 Utah, 458, 57 Pac. Rep. 537.

[2] Wheatley v. Baugh, 25 Pa. St. 528; Chasemore v. Richards, 7 H. L. C. 349; Wood v. Wand, 3 Exch. 748; Wright v. Howard, 1 S. & S. 190.

[3] Haldeman v. Bruckhart, *supra*.

[4] Hansen v. McCue, 42 Cal. 303; Crescent M. Co. v. Silver King M. Co., 17 Utah, 444, 54 Pac. Rep. 244; Wheatley v. Baugh, *supra;* Village of Delhi v. Youmans, 50 Barb. 316, 45 N. Y. 362; Southern Pac. Ry. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783; Cross v. Kits, 69 Cal. 217, 10 Pac. Rep. 409; Ellis v. Duncan, 21 Barb. 230; Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 587.

[5] Acton v. Blundell, 12 M. & W. 344, 348; Strait v. Brown, 16 Nev. 317; Balston v. Bensted, 1 Campbell, 463; Rostrum v. Taylor, 11 Exch. 369; Chatfield v. Wilson, 28 Vt. 49.

neath the ground upon which it is dug, is not liable therefor,[1] still, if such water flows underneath his neighbor's ground through a defined current or course, he is liable for such diversion.[2] The reasoning of the courts in these cases seems to be to the effect that water flowing through subsurface channels, capable of being defined and established, does not differ from that flowing upon the surface, the same rule of law being applicable to both.[3] Thus, in an early California case it was held that underground currents of water flowing in definite channels are known to exist in considerable volume, particularly in limestone regions; and where their existence is shown, there is no doubt, either upon reason or authority, that the rules of law which govern similar streams flowing upon the surface are applicable to them; and that no one, merely because he is the proprietor of the soil through which it passes, can claim the *corpus* of the water or the flowing stream, or intercept it in its natural descent to the lands of the proprietor below.[4]

The supreme court of Nevada has gone pretty nearly to the danger line in holding that where water flowing from a spring had sunk into the earth above the lands of the plaintiff, and found its way, underneath the surface, to his lake or slough, from which slough he had taken water for several years, he had thus acquired a right to take water by prior appropriation, and that another party would not be permitted to divert this water above the point where it sunk into the earth.[5] This case seems to have been decided upon the theory that it was established in the court below that this water flowed through an underground current which was well defined. This being true, of course the case would fall within the rule of the other cases upon the subject. But we think an examination of this, and the other cases on the

[1] See authorities *ante*, § 331.

[2] See authorities in note 5, *ante*, p. 301.

[3] Hansen v. McCue, *infra;* Dickinson v. Grand Junction Canal Co., 7 Exch. 282, 21 L. J. Exch. 241; Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523.

[4] Hansen v. McCue, 42 Cal. 303, 308. See also Herriman Irrig. Co. v. Butterfield M. Co., 19 Utah, 453.

[5] Strait v. Brown, 16 Nev. 317.

subject, will demonstrate, what we have always understood to be the true rule, that the existence or non-existence of an underground channel must always be a question of fact, to be proved like any other fact in the case, and that the burden of establishing the existence of such underground channels would be upon the party asserting it.

To constitute a water-course above or below the surface in which rights can be acquired, the flow must possess that unity of character by which it can be identified.[1]

[1] Briscoe v. Dwight, 11 Ir. C. L. R. 250. See also Ewart v. Belfast Poor Law Guardians, 9 L. R. Ir. 172; McNab v. Robertson, 66 L. J. P. C. 27, 75 L. T. 666.

CHAPTER VII.

OF COAL LANDS AND OF IRON LANDS.

§ 335. Coal lands are mineral lands, as a general rule — Special exceptions.
336. Iron lands generally — How classified.
337. *Résumé* of the foregoing — Distinctions between lode, placer, valuable deposit.

§ 335. Coal lands are mineral lands, as a general rule — Special exceptions.— Coal lands may be entered by persons properly qualified without having previously made any location. Indeed, in the statutes with reference to reservations of mineral lands, it is not classed in railroad grants as mineral land. But this may be considered as a special rule merely, and does not alter the fact nor the general rule that coal is a mineral for all purposes of mining law. It is not necessary for us to decide at the present time what the manner of its creation, nor what the manner of its occurrence, nor that it may or may not be chiefly of vegetable origin. It comes within our definition and within the common definition of mineral,[1] and is, therefore, for the purpose of this work, to be so considered. But inasmuch as no previous location of a claim is necessary, the initial step in claiming it being the filing of the declaratory statement in the land office, the treatment of the question more properly belongs to the part of this work devoted to the application for patent, and its consideration will therefore be postponed to that time.[2]

§ 336. Iron lands generally — How classified.— Iron mines and claims within the United States are composed of three classes:

First. The iron mines within that portion of the public domain where the mining laws do not apply, such as Ala-

[1] *Ante*, Part III, ch. I.

[2] *Post*, Part X, ch. II.

bama, Wisconsin and Minnesota, and all other states where iron may be found, and where by express statute the mining statutes do not apply. In all such states iron land may be entered and patented the same as agricultural land.[1]

Second. Where iron is found in stratified beds between defined boundaries, or where it is found in fissures, it must be classified as a lode claim, and may be located and patented as such.[2]

Third. Where it is found in any other form, as in unstratified beds or bog iron, and under such circumstances as that it cannot be said that it lies within defined boundaries, it would seem to follow that it must be classed as "other valuable deposits," and consequently be located only as placer.[3]

There has been some discussion in the land office[4] somewhat at variance with these observations. But we are satisfied, after a careful examination of the law, that this is the logic of the situation, and the construction that must ultimately be placed upon the law.

§ 337. Resume of the foregoing — Distinctions between lode, placer, valuable deposit.— It is not our purpose to review at length all the matter contained in the foregoing part of this work, but merely to show as best we may the distinction which should be drawn between metallic or non-metallic minerals found within lodes or veins of rock in place, gold placer, and all other placer and valuable deposits. We have briefly illustrated this in the last preceding section with reference to iron deposits or veins, and it would seem that this, taken in connection with what we have elsewhere said in this work,[5] except to elaborate somewhat,

[1] See Act of March 3, 1883, 22 Stat. at L. 487; 1 Supp. R. S. U. S. 404. See also *ante*, Part III, ch. II.

[2] Com. Drummond to Sur. Gen. Silas Reed, Copp's Min. Lands, p. 124; Lindl. Mines, § 328. See also Barringer & Adams on Mines, Preface, lxxxiv, lxxxvii.

[3] Barringer & Adams on Mines, Geological Preface, xcix, cii.

[4] Wheeler v. Smith, 23 L. D. 395.

[5] See *ante*, Placers Generally, § 309; also *ante*, Part III.

leaves nothing to add in order to demonstrate what the real intention of congress was in passing the mining law, arranged as it was, and speaking as it did, from the standpoint of experience at three different dates in our national history.

It must be remembered that the statute of 1866 attempted to deal exclusively with the rights of the miners to lode claims, providing who might locate them and providing for the patenting of the same, and crystallizing in statutory form the sentiment which had taken firm hold of the miners of the Pacific slope, to the effect that aliens should be excluded from ownership; and the necessity, which experience had demonstrated, of recognizing and protecting the new right which had grown up and been recognized by the miners themselves, of pursuing the vein on its dip, which found expression, in the second section of the statute, in these words: "Together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, and the land adjoining shall be sold subject to this condition."[1] This statute, it will be observed, included cinnabar, which never was found in the form of veins, to our knowledge, but was silent upon the subject of placer claims. To supply this defect or omission in the law the statute of 1870[2] was passed, which was commonly known as the Placer Law.

It will be noted, as we have elsewhere observed,[3] that this statute in turn makes two classes of placer or deposit claims — one gold placer, and the other all other forms of "valuable deposit." Nor can we agree with the reasoning of Secretary Hoke Smith,[4] or rather of the assistant attorney-general and approved by him, in which he is made to say in effect that he regards it as plain that congress only contemplated that lands valuable for the more precious

[1] Act of July 26, 1866, 14 Stat. at L., p. 251, sec. 2.

[2] Act of July 9, 1870, 16 Stat. at L., p. 217.

[3] See *ante*, §§ 308, 309.

[4] Wheeler v. Smith, 23 L. D. 395. See also Wheeler v. Smith, 5 Wash. 704, 32 Pac. Rep. 784. Compare Freezer v. Sweeney, 8 Mont. 508, 21 Pac. Rep. 20.

metals could be patented as lode claims. To our mind it is equally plain that congress had in contemplation the means of providing for the location, sale and patenting of the mineral lands of the United States within the public-land portion thereof, which should not otherwise be withdrawn from the operation of such statutes; that ample provision was made for this purpose, and that the form of mineral occurrence within a given tract of land should furnish the test as to what law was applicable, and, following which, whether the same should be locatable as lode claims or as placers.

Not to repeat, we think we are justified in extracting the following conclusions from the law on this subject, and in doing so we are not unmindful of the every-day experience of the miner within the Rocky Mountain and coast ranges, that veins or lodes cannot be described by any one controlling and general definition; that there are veins of intrusion, veins of substitution, fissures and bedded veins; that a lode may compose many veins, spurs and offshoots; but that a true fissure vein should not be swallowed up by any broad vein or zone or broad-lode theory.

With these preliminary observations we epitomize:

First. That any lode, vein or deposit of rock in place between defined or definable boundaries containing any of the precious or economic metals or minerals, excepting coal, whether metallic or non-metallic, should be held to be and is locatable and patentable as a lode claim.

Second. That placer includes all forms of mineral or metal-bearing earth not comprehended by the term "rock in place," and that it is again subdivided into —

(*a*) Gold-bearing gravel or placer, whether it be found in gravel beds, that is, the beds of ancient rivers or glaciers, or whether it be in the slide or drift of the mountain side or beneath the surface of a river, lake or sea.

(*b*) All other forms of valuable deposit of mineral or metal-bearing earth, including all forms of building or other stone deposits that are not within defined boundaries, whether they are mineral or metal bearing, or classed as non-metallic or merely as building stone.

PART VII.

OF THE ESSENTIALS OF A VALID LOCATION.

CHAPTER I.

OF DISCOVERY — ITS DEFINITION, ITS CHARACTER, SUFFICIENCY AND IMPORTANCE — EFFECT OF LOSS OF.

§ 340. General principles — Preliminary observations — The statutes of the United States — General essentials of a valid location.

341. Definition of location.

342. Definition of mining claim — Distinction between, and location — Group of locations is a "claim."

343. Canadian definitions.

344. Definition of discovery.

345. Same subject — Other definitions by the courts — Mineral-bearing rock in place.

346. Discovery continued — Commentary upon special meanings under state statutes.

347. Same subject — Decisions and definitions of discovery under state statutes — Discovery shaft must be on unappropriated ground — Discovery shaft in general — Relation of, to claim.

348. Same subject — What constitutes a valid discovery — Rich or poor — "Float rock" — "Ledge matter" — What a miner would follow as a vein.

349. Some special rules and principles relating to discovery, and of the degree of certainty and good faith required.

350. Posting on ridge of rocks — Speculative proceeding — Good faith required.

351. Effect of loss of discovery — On two claims.

352. Exceptions — Contract to deed back — How question raised.

353. Discovery elsewhere on the claim.

354. Discovery after location — New discovery after loss, when takes effect.

355. Importance of discovery — First in time, stronger in right.

356. State statutory provisions as to discovery and discovery work.

357. Presumption of location and discovery — Statute of limitations.

358. Discovery gives time to complete location — The rule independent of state statutes.

359. Discovery essential — Possession for that purpose protected.

360. Discovery on placer ground.

§ 340. General principles — Preliminary observations — The statutes of the United States — General essentials of a valid location. — The essentials of a valid location, broadly stated, are, discovery, posting and recording of the notice, and marking the location on the ground so that its boundaries can be readily traced.[1] The general principle, proceeding from common sense, is that no man would desire to make a location nor spend his time and money in mining for mere pastime; nor unless he discovered such indications on vacant ground, or had knowledge of mineral within limits of ground already appropriated sufficiently near to the ground sought to be located to afford a just and reasonable inference that the expenditure of time and money upon the ground so sought to be appropriated would be likely to develop such a showing of mineral as to justify its location as a mining claim.

The provision of the statute of the United States material to this branch of our inquiry reads as follows:[2] "And no location of a claim shall be made until the discovery of the vein or lode within the limits of the claim located." We are now concerned in ascertaining what is meant by discovery, within the meaning of this statute, and what will satisfy its requirements. Inasmuch as many of the states have attached a further requirement of certain acts of discovery, such as the sinking of a discovery shaft a certain depth, and in some cases the development of a well-defined crevice of mineral, it will be necessary to examine some of the salient features of those statutes.

§ 341. Definition of location. — Strictly speaking, the word "location" is a verb signifying the act of appropriating mining ground or other public land. Mr. Justice Field, in the supreme court of the United States, speaks of it as

[1] Hawes v. Victoria Copper M. Co., 169 U. S. 393; Book v. Justice M. Co., 58 Fed. Rep. 106; Cheesman v. Shreve, 40 Fed. Rep. 787; Migeon v. Mont. Central Ry. Co., 77 Fed. Rep. 249.

[2] R. S. U. S., § 2320.

"the act of appropriating such parcel, according to certain established rules."[1] The Century Dictionary defines it as "the act of fixing by survey, or otherwise determining the site or bounds of a piece or tract of land (as under a claim for a specified quantity of public land), laying out a railroad or canal, or the like."[2] In mining, however, it is very frequently used indiscriminately with the word "claim" and as signifying the same thing. This definition would not be incorrect where the piece of land referred to only constituted one "claim" or "location." But it not infrequently occurs, as we shall soon have occasion to notice,[3] that a claim, so called, frequently includes several locations, in which case, of course, the words would not be synonymous.[4]

§ 342. Definition of a mining claim — Distinction between, and location — Group of locations is a "claim." — As intimated in the last section, the terms "mining claim" and "location," in the abstract, and when spoken of in connection with one parcel of land, mean the same thing.[5] But in the concrete, the term "mining claim" may often indicate one or more locations, and where more locations than one are grouped together and so operated, we still find them spoken of as a "mining claim." This matter received careful consideration in the supreme court of the United States at the hands of Mr. Justice Field, in a case decided by that court at an early day, where the able justice illustrates when the two terms are synonymous and when they are totally different. He says: "They (the statutes) speak of locations and limit the extent of mining ground which an individual or an association of individuals

[1] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636. See also Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350.

[2] Cent. Dict., title Location.

[3] *Post*, § 342.

[4] St. Louis S. & R. Co. v. Kemp, *supra*.

[5] S. F. Mackie, 5 L. D. 199; McFeters v. Pierson, 15 Colo. 201, 24 Pac. Rep. 1076; Chambers v. Harrington, 111 U. S. 350; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; United States v. Iron Silver M. Co., 128 U. S. 673.

may embrace in one of them. There is nothing in the reason of the thing nor in the language of the acts which prevents an individual from acquiring by purchase the ground located by others and adding it to his own. The difficulty with the court below . . . evidently arose from confounding 'location' and 'mining claim,' as though the two terms always represent the same thing, whereas they often mean very different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel according to certain established rules. . . . The location, which is the act of taking the parcel of mineral land, in time became among the miners synonymous with the mining claim originally located. So, now, if a miner has only the ground covered by one location, his 'mining claim' and 'location' are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires the adjoining location of his neighbor, that is, the ground which his neighbor has taken up, and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim."[1]

In an early case in the federal court we find this language: "'Mining claim' is the name given to that portion of the public mineral land which the miner takes up and holds . . . for mining purposes."[2]

The supreme court of California has, in two instances at least, classed a group of mining claims as a "mining claim" for the purpose of allowing a miner's lien to attach to the entire group for work done on or in connection with one claim.[3]

The supreme court of the United States in a later case say: "In such cases it has always been the practice for the

[1] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636.

[2] Mount Diablo M. M. Co. v. Callison, 5 Sawy. 439, 17 Fed. Cas. 918.

[3] Malone v. Big Flat Gravel M. Co., 76 Cal. 583, 18 Pac. Rep. 772; Tredenick v. Red Cloud M. Co., 72 Cal. 78, 13 Pac. Rep. 152.

owners of different locations to combine and work them as one general claim."[1] The supreme court of Colorado[2] and the supreme court of Nevada[3] recognize the same rule.

§ 343. Canadian definitions. — Inasmuch as we have thought best, on account of the close relations of the two countries, to insert in this work the salient features of the Canadian mining law, it is proper at this time to give their definition, that is to say, the definition in the various provinces of the word "mine." It will thus be seen that it is used there in a very broad and comprehensive sense. "Mine shall include every shaft in the course of being sunk, and every adit, level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all shafts, levels, planes, works, machinery, tramways and sidings, both below ground and above ground, in and adjacent to a mine, and any such shaft, level and inclined plane belonging to any mine to which this act applies, together with all rocks, soils or strata containing any rocks or minerals, and all roast yards, smelting furnaces, and other places where the work of mining may be carried on."[4] Substantially the same definition is given in the statutes of the other provinces.[5]

§ 344. Definition of discovery. — There have been many acts of discovery and surface developments which have

[1] Jackson v. Roby, 109 U. S. 440. See also Chambers v. Harrington, 111 U. S. 350.

[2] McFeters v. Pierson, 15 Colo. 201; Poire v. Wells, 6 Colo. 406.

[3] Gleason v. Martin White M. Co., 13 Nev. 442. See also Mallett v. Uncle Sam M. Co., 1 Nev. 194.

[4] R. S. Ont. 1897, ch. 36, amended by 61 Vict., ch. 11, and 62 Vict., ch. 10, § 2.

[5] Quebec, sub. 2, § 1 (1421); Quebec, Min. Law of 1892; New Brunswick (1), § 2, Gen. Min. Act 1891; Manitoba, sub. 1, § 2, the Mines Act 1897; Nova Scotia, § 2, R. S. Nova Scotia (5th series), with amending acts, ch. 8; Northwest Territories, § 2, Regulations, Quartz Mining Claims on Dominion Land in Manitoba and the Northwest Territories, approved March 21, 1898; British Columbia, § 2, Placer Mining Act 1891, amended 1898-99, ch. 136. Pamphlets containing these laws may be obtained on application to the commissioner of mines.

been held to be sufficient under the statute. We have selected a definition which substantially conforms to the decisions of many cases on that subject. While there are slight verbal changes, it may be said that, within the meaning of the statute, the word "discovery" may be defined to be the actual finding of mineral-bearing rock in place, or speaking more accurately, and according to the experience of miners, the discovery of mineral-bearing ore within the crevices of the rock, or incased within defined boundaries, or such indications of the presence of ore within rock in place, as previously defined in this work,[1] as an experienced miner would feel justified in spending his time and money upon with the reasonable expectation of finding ore in paying quantities.[2] It will be seen from the foregoing definition, which we give as the epitome and result of the gleaning and sifting of the cases mentioned in the note, that the meaning of the word "discovery" does not differ essentially, as it is used in mining, from its meaning as employed in general literature. It is thus defined by the Century Dictionary: "The act of disclosing to view; the act of finding out or bringing to knowledge what was unknown; the first knowledge of anything."[3] In his second edition of Mineral Lands, Mr. Copp has appended a glossary in which he thus defines "discovery:" "The finding of mineral deposit in place upon a mining claim."[4] Thus it may be said to be the

[1] *Ante*, definition "In place," § 297.

[2] Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; King v. Amy & Silversmith M. Co., 152 U. S. 222; Page v. Summers, 70 Cal. 121, 12 Pac. Rep. 120; Hauswirth v. Butcher, 4 Mont. 292, 1 Pac. Rep. 714; McShane v. Kenkle, 18 Mont. 208, 44 Pac. Rep. 979; Book v. Justice M. Co., 58 Fed. Rep. 106; Montana Ry. Co. v. Migeon, 68 Fed. Rep. 811; Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. Rep. 1075; Shreve v. Copper Bell M. Co., 11 Mont. 309, 28 Pac. Rep. 315; Walsh v. Mueller, 16 Mont. 180, 40 Pac. Rep. 292; Harrington v. Chambers, 3 Utah, 94; Golden Terra M. Co. v. Mahler, 2 Dak. 399, 4 M. R. 390; Burk v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49; Armstrong v. Lower, 6 Colo. 393; Michael v. Mills, 22 Colo. 439, 45 Pac. Rep. 429.

[3] Century Dictionary, tit. "Discovery," 1–4.

[4] Copp's Mineral Lands (2d ed.), p. 559.

disclosing or uncovering of a mineral-bearing vein of rock in place, of such a nature, character, quality and value as to entitle it to be located and claimed under the provisions of the statute.

§ 345. Same subject — Other definitions by the courts — Mineral-bearing rock in place. — It thus appears, and the statute requires, that there should be an actual discovery of mineral-bearing rock in place before it can be said that the miner has made such a discovery as entitles him to locate a claim.[1] As was said by Judge Hawley in a recent case: "When a locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in making a location of a mining claim."[2]

Substantially this definition has been made in many cases,[3] and where the seams of mineral matter are of the same character as those located upon by other miners in the district, it will be held sufficient.[4] It is not necessary that the locator should be the first discoverer,[5] nor that the discovery be made before staking,[6] if there are no intervening rights;[7]

[1] Cheesman v. Shreve, 40 Fed. Rep. 787.

[2] Book v. Justice M. Co., 58 Fed. Rep. 106, 120.

[3] Golden Terra M. Co. v. Mahler, 4 Morr. M. R. 390; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 66, 11 Fed. Rep. 666; Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887; Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; Wenner v. McNulty, 7 Mont. 80, 14 Pac. Rep. 643; Overman S. M. Co. v. Corcoran, 15 Nev. 147.

[4] Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801, 31 C. C. A. 228, affirming s. c., Rutter v. Shoshone M. Co., 75 Fed. Rep. 87; s. c., 177 U. S. 505, 44 L. ed. 864.

[5] Book v. Justice M. Co., *supra*; Jupiter M. Co. v. Bodie Cons. M. Co., *supra*.

[6] Erwin v. Perigo, 93 Fed. Rep. 608, 35 C. C. A. 482, affirming s. c., Perigo v. Erwin, 85 Fed. Rep. 904; Brewster v. Shoemaker (Colo.), 63 Pac. Rep. 309, 53 L. R. A. 793.

[7] North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522; Jupiter M. Co. v. Bodie Cons. M. Co., *supra*.

although it has been held that no rights can be acquired until an actual discovery.[1] Still we think the better rule to be that if a miner is in possession, with boundaries staked, or with a notice up, and seeking in good faith to establish or verify the presence of mineral, he has a reasonable or statutory time in which to accomplish it; and this is the substantial meaning of the decision of the supreme court of the United States.[2]

We are not unmindful of early decisions to the effect that all locations must rest upon valid discovery, and we subscribe to that doctrine; but this does not take away or extinguish in any degree the beneficial effect flowing from a practical application of the doctrine of relation, from which results the conclusion that all the acts of location should relate to one date if taken in due season, and that date should be the date of the first step taken to make a location.

§ 346. Discovery continued — Commentary upon special meaning under state statutes.— We have thus set forth some of the general definitions given by the courts as to the meaning of the word "discovery," as applied to mining. We shall give some special definitions in the succeeding sections of this work,[3] and preliminary thereto it is proper to observe at this time, that the word "discovery" has a special and restricted, and at the same time, in one sense, enlarged meaning, under certain state statutes, which will be found in the Appendix, and which, so far as they have been examined by the courts, will appear at length herein. Thus, speaking in a general way, in Colorado, New Mexico, Wyoming, Montana, the Dakotas, Arizona and Nevada, it would not be enough to make a discovery of an outcropping vein of ore, no matter how rich, upon the surface of the earth, but it must be supplemented by sinking a shaft ten feet deep, or deeper if necessary, and disclosing therein a

[1] See note 7, *ante*, p. 315.

[2] Erhardt v. Boaro, 113 U. S. 527, 28 L. ed. 1113, 1116, reversing s. c., 8 Fed. Rep. 860.

[3] *Post*, §§ 347, 348, 349.

well-defined crevice of mineral-bearing rock in place. In Montana it was formerly required that at least one wall inclosing the vein be thus disclosed as well; but this rule no longer obtains even there, the statutory requirement being, "disclosing a well-defined crevice therein." This invites examination as to the meaning of the word "crevice," which is defined to be a crack, a cleft, a rent, and specifically, in lead mining in the Mississippi Valley, fissures in which the ore or lead occurs.[1] This is undoubtedly the sense in which it is applied in the mining statutes, and according to the decisions, as we have seen, it is understood to mean generally any exposure of a body of mineral-bearing rock, earth or ore in place; and we believe that, under such statutes, and even under the old Montana statute, a shaft sunk ten feet into solid ore, without a wall being disclosed anywhere, would satisfy the most skeptical — it would certainly satisfy a miner,— and would be held sufficient, provided, of course, that the circumstances of the surrounding country were such as to leave no room for doubt as to the ore being in place as contradistinguished from a slide. It is only occasionally, however, that such circumstance occurs in practical mining, and very rarely that the body of ore is larger than the discovery shaft, or is found without one of the walls being also found.

§ 347. Same subject — Decisions and definitions of discovery under state statutes — Discovery shaft must be on unappropriated ground — Discovery shaft in general — Relation of, to claim. — Pursuing the line of thought adverted to in the last section, to perfect a valid location the prospector must discover a vein or lode upon the unoccupied, unappropriated public domain. He must then perform certain acts, wherever required by state laws or district rules, among which generally is the sinking of his discovery shaft within the limits of the property which he has the right to

[1] Cent. Dict., tit. "Crevice."

appropriate, and not upon occupied or claimed ground;[1] he cannot be allowed to sink such shaft within the limits of a prior valid, subsisting location;[2] and in some states, as above indicated, he must sink a discovery shaft ten feet deep or deeper, until a well-defined crevice is disclosed.[3] But, though the locator of a mining claim must sink his shaft and make a discovery therein prior to the filing of his certificate, yet if he shall thereafter so sink the same, he will hold against all who had not theretofore acquired substantial, valid, conflicting interests, and such discovery will thereupon relate to his first step.[4] The shaft alone is not sufficient: it must show a well-defined crevice in the shaft;[5] but it need not contain ore or mineral, if it shows mineral-bearing rock — that is, the crevice material or contents of the vein.[6] If the outcrop of the vein or mineral-bearing rock is found on the surface, the statutes of some jurisdictions allow the discoverer a fixed period of time, generally sixty days, to show the vein or body of mineral at a depth of ten feet and perform the other acts of location. It is incumbent on the locator to do all these acts within the time required by the state statute, or it will generally be held an abandonment, and his rights cease.[7] It has been held that the location must rest upon what is found in the discovery shaft, and that ore found elsewhere would not be sufficient;[8] but this decision has been departed from, if it can be said that it was ever controlling, and in the later cases, both in federal and state

[1] Omar v. Soper, 11 Colo. 389, 18 Pac. Rep. 448; Upton v. Larkin, 5 Mont. 600, 6 Pac. Rep. 66.

[2] Armstrong v. Lower, 6 Colo. 398, 15 M. R. 681.

[3] Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 654.

[4] Id.; Brewster v. Shoemaker (Colo.), 63 Pac. Rep. 309, 53 L. R. A. 793; Fuller v. Harris, 29 Fed. Rep. 814; Zollers v. Evans, 2 McCrary, 39, 5 Fed. Rep. 172. See also *ante*, § 345.

[5] Cheesman v. Shreve, 40 Fed. Rep. 787.

[6] McCaig v. Bryan, 10 Colo. 399, 15 Pac. Rep. 418. See also Upton v. Larkin, 5 Mont. 600, 6 Pac. Rep. 66; s. c., 7 Mont. 449, 17 Pac. Rep. 728.

[7] Erhardt v. Boaro, 113 U. S. 527.

[8] Van Zant v. Argentine M. Co., 2 McCrary, 159, 4 M. R. 441, 8 Fed. Rep. 725.

courts, a locator may abandon the original discovery and rest his claim upon a discovery made subsequent and elsewhere in the claim.[1]

§ 348. Same subject — What constitutes a valid discovery — Rich or poor — "Float rock" — "Ledge matter" — What a miner would follow as a vein. — Thus it may be said, independent of the requirements of local statutes already noticed, and which will be adverted to in the further sections of this work, the courts, in reciting the essentials of a valid location and what constitutes a discovery under the statute, have laid down a similar rule in many cases, and have substantially held that the value of the rock found is not a determinate element, and that the finding of mineral-bearing rock in place constitutes a valid discovery, whether such rock assays high or low. But it must be in place, as distinguished from "float rock," and must be what the miners of the vicinity recognize as "ledge matter;" that is, the matrix of the ledge, which the experienced miner will follow as the vein. It is essential, too, that such discovery be made upon the unappropriated public domain, and it will be held sufficient when such indications are exposed as the miner will recognize as a vein in place.[2] As was said by the circuit court of appeals in a leading case: "The question as to what constitutes a discovery of a vein or a lode under the provisions of section 2320 has been

[1] Perigo v. Erwin, 85 Fed. Rep. 904; affirmed, Erwin v. Perigo, 93 Fed. Rep. 608, 35 C. C. A. 482; Silver City M. Co. v. Lowry, 19 Utah, 334, 57 Pac. Rep. 11; Cayuga Lode, 5 L. D. 703; Hogland, 1 L. D. 593; Spur Lode, 4 L. D. 160; Brewster v. Shoemaker (Colo.), 63 Pac. Rep. 309, 53 L. R. A. 793.

[2] Book v. Justice M. Co., 58 Fed. Rep. 106; Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801; Larkin v. Upton, 144 U. S. 19; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. Rep. 673; Conway v. Hart (Cal.), 62 Pac. Rep. 44; Wolfley v. Lebanon M. Co., 4 Colo. 112; Shreve v. Copper Bell M. Co., 11 Mont. 309, 28 Pac. Rep. 315; Ormond v. Granite Mt. M. Co., 11 Mont. 303, 28 Pac. Rep. 289; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; Muldrick v. Brown (Oreg.), 61 Pac. Rep. 428; Etling v. Potter, 17 L. D. 424; Tam v. Story, 21 L. D. 440; Castle v. Womble, 19 L. D. 453.

decided by many courts. . . . The liberal rules thus established are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantities to justify him in expending his time and money in developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found."[1] The necessity of discovery as an essential part of a location is everywhere recognized,[2] and applies as well to placer, oil and hydro-carbon claims as it does to lodes.[3]

§ 349. Some special rules and principles relating to discovery and of the degree of certainty and good faith required.— Enough has appeared in the foregoing to demonstrate the necessity and importance of the discovery of mineral in some form. Not every hole in the ground can be characterized as a discovery. There must be such a showing, as already remarked, as to justify a miner of the district in following it, with the reasonable expectation of finding ore in paying quantities; nor will the outcropping of vein matter alone constitute a valid discovery: it must be sufficiently exposed by work or otherwise to disclose that the mineral is in place.[4] No standard of value, however, will be required;[5] the discovery gives the right of pos-

[1] Migeon v. Mont. Central Ry. Co., 77 Fed. Rep. 249, 255, 23 C. C. A. 156. See also Harrington v. Chambers, 8 Utah, 94; Hays v. Lavagnino, 17 Utah, 185.

[2] Waterloo M. Co. v. Doe, 17 L. D. 111; Wight v. Tabor, 2 L. D. 738; Edward W. Williams, 20 L. D. 458; Re Silver Jennie Lode, 7 L. D. 6.

[3] Olive Land & Dev. Co. v. Olmstead, 103 Fed. Rep. 568. See also Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. Rep. 673; Gird v. California Oil Co., 60 Fed. Rep. 533.

[4] Brownfield v. Bier, 15 Mont. 403, 39 Pac. Rep. 461; United States v. Iron Silver M. Co., 128 U. S. 688; Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

[5] Golden Terra M. Co. v. Mahler, 4 M. R. 390.

session when valid,[1] and is essential to the preservation of the claim.[2] Within well-defined boundaries very slight evidence of ore will prove the existence of a lode and be sufficient to constitute a discovery and justify a location.[3] Also, as often occurs in veins of substitution, the presence of ore in rock in place, even though poor in value, will be recognized as a vein to the extreme point of its occurrence, and a discovery made thereon would be sufficient.[4]

In a dissenting opinion by Judge De Witt, of Montana, is found a fair solution of the term "valuable" as applied to discovery: "Assuming that the mineralized vein is found, the mineral deposit discovered, the whole proposition reduces itself to an interpretation of the word 'valuable,' as used by the statute. Must the deposit at the time of discovery be valuable enough to pay to work as a mine, or must some other meaning be discovered as the true intent of the use of the word 'valuable?' The miner has twenty days in which to record his claim. Must his prospective mine appear within these twenty days to be valuable enough to pay for extracting the minerals, or must the quality of valuableness be determined upon considerations other than certainty of a paying mine at the time of location? Distinguished judges in the mining countries have recorded their views of what constitutes a miner's lode or vein. Their language is as household words in the courts and among the lawyers and miners of the states."[5]

The learned judge then quotes with approval the follow-

[1] Belk v. Meagher, 104 U. S. 279. See Little Pittsburg Cons. Co. v. Amie M. Co., 17 Fed. Rep. 57.

[2] Erhardt v. Boaro, 113 U. S. 527; Zollers v. Evans, 5 Fed. Rep. 172; Eilers v. Boarman, 3 Utah, 159.

[3] Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

[4] Meydenbauer v. Stephens, 78 Fed. Rep. 787; Stephens v. Williams, 1 McCrary, 480, 1 M. R. 566, Fed. Cas. No. 13,413.

[5] Shreve v. Copper Bell M. Co., 11 Mont. 309, 28 Pac. Rep. 315. See also Harrington v. Chambers, 3 Utah, 94; affirmed, Chambers v. Harrington, 111 U. S. 350; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 675; Book v. Justice M. Co., 58 Fed. Rep. 106.

ing words from Mr. Justice Emerson of Utah: "I have long thought, and still think, that under the requirements above quoted,[1] a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral as that he is willing to spend his time and money in following in the expectation of finding ore."[2] It necessarily follows that a mining location, however good it may otherwise be, is invalid in the absence of the discovery of a vein or lode such as we have described, or of the indications thereof such as would justify the expenditure of time and money with the reasonable expectation of finding ore.[3]

§ 350. Posting on ridge of rocks — Speculative proceeding — Good faith required.— We have thus attempted to demonstrate that there must be an actual rather than a theoretical discovery of mineral, and this is the rule; but it would not exclude from proper consideration a location made from knowledge acquired by underground workings in adjacent ground of the presence of a vein entering on its strike the ground sought to be located. As, for instance, where a blind lode is known to proceed for considerable length through the country and is located and worked to the margin of the ground sought to be located, it will often amount to a sufficient discovery,[4] provided, of course, the surface indications are such — as, for instance, the presence of a contact of different kinds of country rock — as to afford a just inference of its continuation. But it has been held that a mere posting of a notice on a ridge of rocks cropping out of the earth, or of other ground, that the poster has located thereon a mining claim, without any discovery, or knowledge on his part of the existence of metal there or in its immediate vicinity, would be justly treated as a mere specu-

[1] R. S. U. S., § 2320.

[2] Harrington v. Chambers, 3 Utah, 94. See also authorities in note 5, *ante*, p. 349.

[3] Deffeback v. Hawk, 114 U. S. 592; Book v. Justice M. Co., *infra*; Iron Silver M. Co. v. United States, 123 U. S. 127; Erhardt v. Boaro, 113 U. S. 527; Davis v. Weibbold, 139 U. S. 507.

[4] Book v. Justice M. Co., 58 Fed. Rep. 106, 121.

lative proceeding and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make the location which will exclude others from the ground, such as the discovery of the presence of precious metals in it, or in such proximity to it as to justify a reasonable belief of their existence.[1]

§ 351. Effect of loss of discovery—On two claims.—Since the right to hold the claim or location is thus made to rest finally upon the existence of a valid discovery, it must necessarily follow that the loss of discovery, either by being patented away by another, or being originally mistakenly placed on patented ground, or ground previously covered by an existing valid location, results in the loss of the claim.[2] The reason of the rule is not difficult of ascertainment, since, as we have attempted to demonstrate, it is the presence of mineral in the land alone which authorizes its location as such, and the discovery is therefore essential to the existence of a valid claim.[3] But it has been held that a discovery shaft partly on one claim and partly on another is sufficient,[4] although this position has been doubted by the land office. Yet upon principle it would seem to be the true rule, for the reason that, the discovery of mineral being essential, its proper discovery in a shaft, in a proper manner, under such circumstances as to justify the conclusion that the strike of the vein continues both ways into both claims, and since there is no rule of law or of practice which fixes

[1] Erhardt v. Boaro, 113 U. S. 527, 537; Ormond v. Granite Mountain M. Co., 11 Mont. 303, 28 Pac. Rep. 289; Copper Globe M. Co. v. Allman (Utah), 64 Pac. Rep. 1019.

[2] Gwillim v. Donellan, 115 U. S. 45; J. G. Kennedy, 10 C. L. O. 150; Miller v. Girard, 3 Colo. App. 278, 33 Pac. Rep. 69; Antediluvian Lode, 8 L. D. 602; Independence Lode, 9 L. D. 571; Lone Dane Lode, 10 L. D. 53; Thos. J. Laney, 9 L. D. 93; Girard v. Carson, 23 Colo. 345, 44 Pac. Rep. 508; Armstrong v. Lower, 6 Colo. 393; Watson v. Mayberry, 15 Utah, 265, 49 Pac. Rep. 479; Reynolds v. Pascoe (Utah), 66 Pac. Rep. 1064.

[3] Miller v. Girard, *supra*.

[4] Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 24. See *post*, § 356, note 3, p. 327.

the dimensions in length or breadth of a discovery shaft, and since such discovery shaft may be an adit many feet in length along the strike of the vein, it would seem that the common line of two claims bisecting such adit or shaft would leave sufficient thereof in each claim to satisfy the requirements of the law.

§ 352. Exceptions — Contract to deed back — How question raised.— In the land department it has been decided, upon reasons which would seem to be unassailable, that where the discovery shaft is on other ground judicially determined to belong to the applicant, a mere protestant will not be heard to say that the applicant has lost his discovery by reason of its being on other ground.[1] So, where the junior locator is permitted to patent his claim with the understanding that he will reconvey the part containing the discovery, the rule does not apply.[2] This question must be settled by the courts, can only be raised in adverse proceedings, and when not so raised will not be considered on protest against the patent.[3] There are other exceptions, some of which we have already noticed and which we will here review at some length; thus,—

§ 353. Discovery of mineral elsewhere on the claim.— As we have already had occasion to remark,[4] not to repeat too often, but in order to show the reason of the rule, the discovery of mineral elsewhere on the claim, if adopted and taken as and for the discovery, will likewise rescue the location from the failure of title otherwise resulting from loss of discovery.[5] The reason of this rule is obvious, and

[1] Mitchell v. Brovo, 27 L. D. 40, citing with approval Gowdy v. Kismet Gold M. Co., 22 L. D. 624; American Cons. M. Co. v. De Witt, 28 L. D. 580.

[2] Duxie Lode, 27 L. D. 88.

[3] Mutual M. & M. Co. v. Currency Co., 27 L. D. 191.

[4] *Ante*, § 347, note 1, p. 318.

[5] Cayuga Lode, 5 L. D. 708; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302; Erwin v. Perigo, 93 Fed. Rep. 608; Silver City G. & S. M. Co. v. Lowry, 19 Utah, 334, 57 Pac. Rep. 11. See *ante*, § 347, note 1, p. 318, § 345.

proceeds from the theory that all the law of congress requires is proof that the ground sought to be claimed as mining ground, and sought to be patented as such, contains either a lode or vein of mineral-bearing rock in place as applied to lode claims, and gold placer or valuable deposit, as herein outlined and defined, as applied to other claims; whence it follows that it can make no difference at what point in the claim this discovery is made so long as it demonstrates the truthfulness of the claim, and a discovery, although not in the discovery shaft, is sufficient as a basis for a location.[1]

§ 354. Discovery after location — New discovery after loss, when takes effect — Discovery beneath surface. — While the general rule is, as stated elsewhere in the foregoing sections, that a location must rest upon a valid discovery, yet a location otherwise good, with a discovery made after location and before the intervention of adverse claims or the creation of adverse rights, will validate the location from the date of discovery,[2] and generally from the first act towards claim and appropriation,— this by relation. This doctrine proceeds from the same rule announced in the last preceding section, concerning which it is proper to add that the law is more concerned, and so should be the courts, with a substantial as well as careful and *bona fide* compliance with its provisions, than with the order in which the various acts of location are performed. And while it has been held that discovery must precede location, the later and better doctrine seems to be that the law is satisfied if discovery is made within a reasonable time after taking possession for the

[1] O'Donnell v. Glenn, 8 Mont. 248.

[2] Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666; Patchen v. Keeley, 19 Nev. 404, 14 Pac. Rep. 347; Golden Terra M. Co. v. Mahler, 4 M. R. 390; Branagan v. Dulaney, 2 L. D. 744; Re James Mitchell, 2 L. D. 752; Zollers & Highland Chief v. Evans, 2 McCrary, 39, 5 Fed. Rep. 172; Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111; Reins v. Raunheim, 28 L. D. 526. Compare Overman S. M. Co. v. Corcoran, 15 Nev. 147.

purpose of inaugurating a claim.[1] And a purchaser from a discoverer, before the completion of the location of a claim, may himself complete the location with the same effect as if done by the discoverer, provided he does so within a reasonable or the statutory time.[2] But if discovery is made after location, or a new discovery is made after the loss of the first discovery, it cannot affect intervening rights, and will only save such portions of the claim as to which there is no conflict at the date of the new discovery.[3] The justice of this rule is self-evident, and a discovery need not be made upon the surface, but will be held sufficient if made in a tunnel or shaft, provided it clearly appears that the claim contains the apex.[4]

§ 355. Importance of discovery — First in time stronger in right. — In the foregoing sections we have attempted to demonstrate the importance of discovery as one of the acts of location. It is the source of the miner's title to the claim or location, and upon its validity rests the rule, first in time stronger in right, which gives to the person making the first discovery, upon compliance with the other provisions of the law, a superior right to the lode.[5] But the

[1] Doe v. Waterloo M. Co., 17 C. C. A. 190, 70 Fed. Rep. 455; Brewster v. Shoemaker (Colo.), 63 Pac. Rep. 309, 58 L. R. A. 796.

[2] Zedlesndorf v. Hutchinson, 1 New Mex. 476, 9 M. R. 482.

Discovery in the Choctaw nation: Right of discovery of mines in the Choctaw nation is not confined to the particular vein discovered, but extends for one mile in all directions from the point of discovery, if the rights of a former settler are not interfered with, under the Choctaw Nation Const., art. 7, § 18, providing that any citizen who finds any mine shall have the exclusive right to work the same "within one mile in any direction from his works or improvements," provided he does not interfere with the rights of a former settler. McCurtain v. Grady (Ind. Ter. App.), 38 S. W. Rep. 65.

[3] Perigo v. Erwin, 85 Fed. Rep. 904.

[4] Brewster v. Shoemaker, *supra;* Book v. Justice M. Co., 58 Fed. Rep. 106.

[5] Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 190; Lamdale v. Daniels, 100 U. S. 113; Boone v. Chiles, 10 Pet. 177; Phillpotts v. Blasdel, 8 Nev. 61; Gibson v. Fuchta, 88 Cal. 310.

above maxim cannot be applied so as to protect a person who settles upon land reserved from settlement by the policy of the law as against one entering lawfully and not included in the reservation.[1]

§ 356. State statutory provisions as to discovery and discovery work.— Nearly all the state statutes enacted supplemental to the law of congress regulate the manner of making discovery, and provide for certain work to be done within a given time, ranging generally from sixty to ninety days. These statutes will be compiled and arranged in full in the Appendix, and it will therefore be unnecessary at this time to give any detailed account of their provisions. Some of them have required, and do now require, work of a certain value, while others, indeed nearly all, require a shaft or opening of a certain depth, generally ten feet. And they generally require that in addition thereto, as we have already had occasion to remark, there shall be disclosed a well-defined crevice or vein. These statutes have been often passed upon by the courts of Colorado and Montana. In the former state, the requirement of the statute that the discovery shaft show a well-defined crevice has been uniformly enforced.[2] But it has been held sufficient that work of any kind, showing a vein at that depth below the surface, would be sufficient.[3] The former statute of Montana, as we have elsewhere observed, required the disclosure of at least one wall; but that is no longer the law there, the requirement being substantially the same as in Colorado. In that state it has been held that the statute must be complied with before there can be a valid location,[4] and the mere disclosure of a vein, unless the

[1] McClintock v. Bryden, 5 Cal. 97.

[2] McCaig v. Bryan, 10 Colo. 309, 15 Pac. Rep. 413; Van Zandt v. Argentine M. Co., 8 Fed. Rep. 725. See also Little Gunnell M. Co. v. Kimber, 15 Fed. Cas. 629 (No. 8,402).

[3] Gray v. Truby, 6 Colo. 278; Electro-Magnetic M. & D. Co. v. Van Auken, 9 Colo. 204, 11 Pac. Rep. 80; Van Zandt v. Argentine Co., *supra*.

[4] Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. Rep. 714. See also O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302; Sanders v. Noble, 55 Pac.

same is shown to contain precious metals, has been held insufficient.[1] But it is sufficient if, at the time the location is completed, the vein or lode is exposed to view and its existence shown by the locators. These facts are equivalent to discovery.[2] And two locations may be made on one discovery.[3]

§ 357. Presumptions of location and discovery — Statute of limitations.— While the general rule is that the place and time of discovery, and direction of the strike of the lode, must be shown,[4] there is a general policy of the law expressed in the statute, which frowns upon any attempt to disturb a possession and claim of long standing. This statute does not relate merely to applications for patent, but it has reference to the discovery and location as well, since it provides that where a claimant has been in possession of a mining claim, and working and operating the same, for a period of time equal to the statute of limitations of the state, in the absence of adverse claim he may patent it without proof of discovery or location.[5] And it has been held in pursuance of this statute that after a lapse of several years it may be presumed in favor of one holding by purchase that a discovery was properly made and notice properly posted,[6] and one whose title is declared bad under one location may relocate the claim and base his title upon such relocation.[7]

§ 358. Discovery gives time to complete location — The rule independent of state statutes.— Since discovery is but one act in the series of acts necessary to complete a valid

Rep. 1037; Ormond v. Granite M. M. Co., 11 Mont. 303, 28 Pac. Rep. 289.

[1] Territory v. McKay (Mont.), 19 Pac. Rep. 395.

[2] Wenner v. McNulty, 7 Mont. 80, 14 Pac. Rep. 643.

[3] McKinstry v. Clark, 4 Mont. 370, 1 Pac. Rep. 759; Poplar Creek Cons. Quartz Mines, 16 L. D. 1.

[4] Silver Jennie Lode, 7 L. D. 6.

[5] R. S. U. S., § 2332.

[6] Harris v. Equator M. & S. Co., 8 McCrary, 14, 8 Fed. Rep. 863; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 658.

[7] Meyendorf v. Frohner, 8 Mont. 282.

location,[1] it follows and is well settled that when a locator is in possession of unoccupied mineral land with the intent of making discovery and location thereon, such acts give the right of possession — not only the right to the place of discovery, but the right to locate an entire claim on the vein. In the absence of statutes regulating the time a prospector may so remain in possession, he would be entitled to a reasonable time, and where there is a statute, of course that governs.[2] The reason of this is apparent, and is to enable the prospector to determine the true strike or course of his vein so that he may define its boundaries in such a manner as to avoid future complications.

As was said by the supreme court of the United States: "During the intermediate period from the discovery of the ore or vein and its excavation, a general designation of the claim by notice posted on a stake placed at the point of discovery . . . stating the date of location, the extent of the ground claimed, the designation of the lode and the names of the locators, will entitle them to such possession as will enable them to make the necessary excavations and prepare the proper certificate for record. The statute of Colorado requires that the discoverer, before a certificate of location is filed for record, shall, in addition to posting the notice mentioned at the point of discovery, sink a shaft upon the lode to the depth of at least ten feet from the lowest part of such shaft under the surface, or deeper if necessary, to show a defined crevice and to mark the surface boundaries of the claim."[3]

It is therefore indispensable that to avoid the mischief which the locator would be compelled necessarily to entail upon himself and his grantees in consequence of making a

[1] Belk v. Meagher, 104 U. S. 271.

[2] Burke v. McDonald, 2 Idaho, 643, 33 Pac. Rep. 49; Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 443; Murley v. Ennis, 2 Colo. 300; Gleeson v. Martin White M. Co., 13 Nev. 442; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Marshall v. Harney Peak M. Co., 1 S. D. 350, 47 N. W. Rep. 290.

[3] Erhardt v. Boaro, 113 U. S. 527.

hasty location, a reasonable time be given for all purposes,[1] and in this case it was held that twenty days was a reasonable time.[2] But the better doctrine would seem to be that each case must stand upon its own four legs, and that no hard-and-fast rule can be laid down; yet it has been held that ninety days was an unreasonable time.[3] One court, however, adopted the rigid requirement that in the absence of local rule or statute the law afforded no time,[4] and the court gave as a reason for this decision the necessity that the rule should be settled. It has been held that what is a reasonable time is a question of law.[5] But the better rule would seem to be to leave it to the jury under proper instructions.[6]

Courts do not agree, and perhaps never will, as to this matter, but the better line of reasoning is as we have laid it down. An example of the difficulty which courts find to agree with each other was never more plainly demonstrated than in a case in California, in which the facts stated were briefly these: Newbill, after making discovery, arranged with three partners to complete the acts of location, who proceeded to do so, but pending which an adverse location was made which the trial court refused to recognize, holding that the first discoverer (N. and associates) had a reasonable time in which to complete the location and that the time employed was not unreasonable. The supreme court of the state held that there was no evidence to justify the finding that the location was completed in a reasonable time, notwithstanding the facts were shown as above stated, and reversed the case.[7] The case was afterwards removed to the federal court, where, upon substantially the same facts being proved, it was held that in the absence of state statutes or district

[1] Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 190.

[2] Ibid., affirming s. c., 55 Fed. Rep. 11.

[3] Murley v. Ennis, 2 Colo. 300; Patterson v. Hitchcock, 3 Colo. 533.

[4] Patterson v. Tarbell, 26 Oreg. 29, 37 Pac. Rep. 76.

[5] Patterson v. Hitchcock, *supra*.

[6] See authorities in note 2, *ante*, p. 328.

[7] Newbill v. Thurston, 65 Cal. 419, 4 Pac. Rep. 409.

rules the locator had a reasonable time in which to complete the location,[1] thus reaching a conclusion opposite to that of the state court. We think the federal court was right, and in this we are supported by later authorities.[2]

§ 359. Discovery essential — Possession for that purpose protected.— The government grants its lands to those citizens who may discover precious metal ores therein, upon the condition that they will define the subject of the grant with such certainty as may be necessary to prevent mistakes on the part of the government in extending like favors to other citizens who may ask a like bounty.[3] There is a well-recognized distinction between the acts essential to indicate possession and occupancy of mineral lands and that of any other kind of lands.[4] It would seem that, as to land actually held by a discoverer, no one can by a later entry or discovery assert a superior title, even though the former has failed to comply with the law; and if the first discoverer is shown to have been on the ground before the time when the second locator desires to make his location, it is for the second locator to show that the first locator had given up his possession.[5] But the utmost good faith on the part of the first occupant is essential. He cannot pursue a dog-in-the-manger course, and, by mere occupancy, exclude other persons who proceed in good faith to make a discovery and location; and where he has failed to seasonably comply with the law, a later discoverer who does so comply will be protected.[6]

[1] Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

[2] See Saunders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1067, citing with approval, Lindley, Mines, § 339.

[3] Faxon v. Barnard, 2 McCrary, 44, 4 Fed. Rep. 702; McCornick v. Varnes, 2 Utah, 355; Blake v. Butte Silver M. Co., id. 54.

[4] English v. Johnson, 17 Cal. 115; Eilers v. Boatman, 111 U. S. 556.

[5] Faxon v. Barnard, *supra;* Lebanon M. Co. v. Cons. Rep. M. Co., 6 Colo. 371; Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 448.

[6] Crossman v. Pendery, 2 McCrary, 139, 8 Fed. Rep. 693; Garthe v. Hart, 73 Cal. 541, 15 Pac. Rep. 93. Compare Harris v. Equator M. Co., 8 Fed. Rep. 865.

§ 360. Discovery on placer ground.— We have already noticed that an actual discovery seems to be contemplated by the statute in order to make a valid location of placer ground.[1] Some doubts have been expressed by the courts as to the necessity of this, the rulings being generally applied to gold placers; but by analogy, as well as sound reason, it seems now well settled that appropriate discovery must be made upon placer locations and all other valuable deposits located as placers, the same as upon lode claims.[2] It may be observed that nearly all the state statutes make no distinction in respect to placer and lode claims in regard to the necessary location work, acts of discovery and annual labor. Of course, it would follow that the same rules would apply to discovery.

Some question has arisen as to whether this discovery should be made upon each twenty acres, and it would seem to depend, as a general rule, somewhat upon the question as to whether each twenty acres is located as a separate claim, or whether the location is of the largest possible size and made by eight persons. The former rulings of the land department were to the effect that the discovery of mineral must be made upon each twenty acres of a placer entry, but this doctrine has been expressly overruled in the later decisions, and it is now held that but one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual or of one hundred and sixty acres or less by an association of persons.[3] And this seems to be the ruling of the state courts wherever they

[1] See *ante*, § 348.

[2] Davis v. Weibbold, 139 U. S. 507; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. Rep. 401; McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. Rep. 668; Moxon v. Wilkinson, 2 Mont. 421; Jackson v. Roby, 109 U. S. 440; Union Oil Co. (on review), 25 L. D. 351; Dughi v. Harkins, 3 L. D. 721; Lincoln Pacer, 7 L. D. 81; Rhodes v. Treas, 21 L. D. 502; Southern Pacific Ry. Co. v. Griffin, 20 L. D. 485; Ferguson v. Hanson, 21 L. D. 336; Reins v. Murray, 22 L. D. 409; Sweeney v. N. P. R. R. Co., 20 L. D. 294; Union Oil Co., 22 L. D. 222.

[3] Union Oil Co. (on review), 25 L. D. 351, 358; approved in Reins v. Raunheim, 28 L. D. 526.

have been called upon to decide this question;[1] but a distinction is made where it is subsequently shown that an area of such claim amounting to a legal subdivision does not contain, or is not valuable for mineral, in which case such legal subdivision will be excluded from entry as placer.[2]

[1] McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. Rep. 688; Gregory v. Pershbaker, 73 Cal. 109.

[2] Ferrell v. Hoge, 27 L. D. 129. See also Quigley v. State of California, 24 L. D. 507.

CHAPTER II.

DISCOVERY WORK — NAMING OF CLAIM AND PRELIMINARY NOTICE.

§ 365. Preliminary — The discovery shaft — The old Spanish rule as to discovery and registry.
366. Posting notice an essential step — Notice and record identical.
367. The notice required by miners' rules — Descriptions in, and posting — Examples.
368. Notice should be liberally construed — Sufficiency of description in — Question of fact.
369. Same subject — Description in location notice *prima facie* only — Parol evidence to explain.
370. Distinction between notice of location and record — Description and posting — Examples.
371. Question of law, extreme rule — Instances of particular notices held insufficient — Question of fact, the true rule.
372. Same subject — Examples of descriptions held sufficient.
373. Location notices under supplemental state statutes.
374. General rules deducible from all — No notice required by United States law.
375. Customary and safer to give notice.
376. No iron-clad rule — Position and manner of posting notice.
377. No man may profit by his own wrong — The rule where a locator is prevented by others from completing acts of location — Intruder or trespasser acquires no rights.

§ 365. Preliminary — The discovery shaft — The old Spanish rule as to discovery and registry. — The preliminary steps in connection with the discovery are the sinking of the discovery shaft, posting the notice or naming the claim, marking the location on the ground, and, where record is made necessary by local law or rule, the recording of a copy of the location notice. These acts have everywhere been considered essential. They had their counterpart in the Mexican law, concerning which Señor Gamboa observes: "Registry is nothing more than public description of the

person who has found the mine, and the place where it is situate, and an exhibition of the ore, to be made before a justice and notary. The practice in the mining districts of New Spain is, to present a written document stating the particulars above mentioned, and the signs by which the mine may be known, setting forth the mines and stakes of other proprietors contiguous to it, and mentioning the name by which it is to be distinguished. All the trial pits, whether large or small pits, trenches, and other works within the boundaries, are to be likewise registered. The justice then declares the mine to be registered, and gives permission to work it; after which the miner must sink it to the depth of three estados; subsequently, also, he prays to have possession given to him, and the boundaries assigned."[1]

§ 366. Posting notice an essential step — Notice and record identical.— Notice is almost everywhere considered essential. The miner's notice and the record under miners' rules are generally the same. The purpose of this notice is to inform subsequent prospectors and locators the exact nature and extent of the ground claimed. The practice ordinarily is to make two copies of the location notice, one of which is posted on the ground and the other filed for record.[2] This is "taking up" the claim, concerning which act the supreme court of California say: "McBrayer discovered this lead or claim and located it by putting up a written notice with plaintiff's name and others on it and thus making claim to the lead. This seems to be the usual mode recognized among miners to indicate the taking up of a

[1] Gamboa, Com., ch. V, sec. II; Rockw. Span. & Mex. Law, p. 173. See also Gamboa's Com., ch. V, sec. VI; Rockw., p. 174.

[2] Doe v. Waterloo M. Co., 17 C. C. A. 190, 70 Fed. Rep. 455; Saunders v. Noble, 23 Mont. 110, 55 Pac. Rep. 1037; Poujade v. Ryan, 21 Nev. 449, 33 Pac. Rep. 659; Souter v. Maguire, 78 Cal. 543, 21 Pac. Rep. 583; McGarity v. Byington, 12 Cal. 426; Brown v. 49 & 56 Q. M. Co., 15 Cal. 152; Burke v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49; Brown v. Levan (Idaho), 46 Pac. Rep. 661; Warnock v. De Witt, 11 Utah, 324, 40 Pac. Rep. 205; McCornick v. Varnes, 3 Utah, 355.

claim of this sort — as, in fact, an appropriation or proof of appropriation of the claim."[1]

The discussion of the question of record will be found in a subsequent chapter,[2] but the general doctrine may be stated here that provisions and observations relative to notice, whether they refer to the notice required by the miners' rules or the temporary notice required by state statute, or to the permanent location certificate required by state statute, apply with equal force to the record, which is only a means of preserving the notice.[3] It is obvious, when the acts necessary to constitute a valid location are accurately understood and taken into consideration, that there must be some notice given from the beginning, as by this means alone, as previously intimated, it often happens that the prospector is made acquainted with the claims of the previous locator.[4]

§ 367. The notice required by miners' rules — Descriptions in, and posting — Examples.— Before the adoption of the federal statute there were provisions in the rules of mining districts requiring the posting of a notice and the recording of a copy of it with the mining recorder. These provisions usually required that the location notice should so define and describe the claim as that a person with it could be materially assisted in determining the whereabouts of the claim.[5] In a comparatively recent case in the federal

[1] Gore v. McBrayer, 18 Cal. 582, 587. "But in the Tuolumne district the notice posted is to be recorded, and if one is sufficient the other is." Carter v. Bacigalupi, 88 Cal. 187, 23 Pac. Rep. 361, 368.

[2] *Post*, this Part, ch. IV.

[3] Carter v. Bacigalupi, *supra;* Brown v. Levan (Idaho), 46 Pac. Rep. 661; Chase v. Savage M. Co., 2 Nev. 9; Faxon v. Barnard, 4 Fed. Rep. 702; Smith v. Newell, 86 Fed. Rep. 56. See authorities, note 1, *ante*.

[4] Gore v. McBrayer, *supra;* Myers v. Spooner, 55 Cal. 257; Thompson v. Lee, 8 Cal. 275; Donahue v. Meister, 8 Cal. 121, 25 Pac. Rep. 1096; Allen v. Dunlap, 24 Oreg. 229, 33 Pac. Rep. 675.

[5] See *ante*, § 366; Harrington v. Chambers, 3 Utah, 94; Gleeson v. Martin White M. Co., 13 Nev. 450; Yale, Mining Claims and Water Rights, p. 78; Baxter Mountain G. M. Co. v. Patterson, 3 New Mex. 179, 3 Pac. Rep. 741.

court for the southern district of California[1] it appeared that the rules of the district required the location notice to refer for boundaries of the claim to subdivisions of the United States survey, and the court held that the notice was sufficient if a map made from it might be referred to for a description of the claim. Where a notice of location of a claim, which is distinctly marked upon the ground, describes the west end corners of it as marked by pine trees, when in fact they are marked by stakes, but refers to another claim as a permanent monument to which the claim sought to be located is tied, the notice is sufficient.[2] The notice of location itself need not refer to any permanent monument or natural object: it is the record which must make such reference.[3] But of course where the notice posted and the one recorded are duplicates, each should contain such reference.

§ 368. Notices should be liberally construed — Sufficiency of description is question of fact.— But these notices should be liberally construed so as to protect the miner, seeking in good faith to acquire title to mining property, in the enjoyment of his rights under the location.[4] While the decisions as to the sufficiency of miners' locations of claims have not pursued a very harmonious course, it may be stated

[1] Gird v. California Oil Co., 60 Fed. Rep. 531.

[2] Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; Seidler v. Lafave (N. M.), 20 Pac. Rep. 789; Seidler v. Maxfield, id. 794.

[3] Poujade v. Ryan, 21 Nev. 449, 33 Pac. Rep. 659; Brady v. Husby, 21 Nev. 453, 33 Pac. Rep. 801; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312. The question of what is a permanent monument or natural object is treated under the head of Recording the Claim, *post*, this Part, ch. IV.

[4] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361; Weill v. Lucerne M. Co., 11 Nev. 200; Brown v. Levan, 46 Pac. Rep. 661 (Idaho); Cullacott v. Cash G. & S. M. Co., 8 Colo. 179, 6 Pac. Rep. 211; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 56 Pac. Rep. 300; Wells v. Davis (Utah), 62 Pac. Rep. 3; Book v. Justice M. Co., 58 Fed. Rep. 106; Bramwell v. Flick, 23 Mont. 95, 57 Pac. Rep. 869; Wiltsee v. King of Arizona M. & M. Co. (Ariz.), 60 Pac. Rep. 396.

as the general rule that the sufficiency or insufficiency of the location notice in each case is a question of fact, to be determined the same as any other fact in the case,[1] and upon which parol evidence may be admitted.[2] There are several cases, however, where the court has either decided the matter peremptorily, holding it to be a question of law, or, what amounts to the same thing, has refused to submit it to the jury.[3]

§ 369. Same subject — Description in location notice prima facie only — Parol evidence to explain. — Enlarging at some length on what we have said in the foregoing sections, it may be said that the courts generally regard the location notice as one of the elements merely by which a location is accomplished, and that it may be aided by parol evidence. In accordance with this principle, in a Montana case the court had under consideration a location notice containing these words: "The mining claim hereby located is situated in Summit Valley mining district, Silver Bow county, Montana territory, and is situated on the northerly side about one-fourth of a mile from Park canyon." In a very able opinion in which this description was discussed by the court, the objection to this location was met by these

[1] DuPratt v. James, 65 Cal. 555; Taylor v. Middleton, 67 Cal. 658, 8 Pac. Rep. 594; Dillon v. Bayliss, 11 Mont. 171, 27 Pac. Rep. 725; Gamer v. Glenn, 8 Mont. 371; Garfield M. Co. v. Hammer, 6 Mont. 53, 8 Pac. Rep. 153; Jantzen v. Arizona Copper Co. (Ariz.), 20 Pac. Rep. 93; Seidler v. Lafave (New Mex.), 20 Pac. Rep. 789; North Noonday M. Co. v. Orient Cons. M. Co., 6 Sawy. 311, 1 Fed. Rep. 522; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96, 11 Fed. Rep. 666; Mount Diablo M. Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886; Wells v. Davis, 22 Utah, 322, 62 Pac. Rep. 8; Farmington G. M. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 59 Pac. Rep. 832.

[2] Dillon v. Bayliss, *supra;* Farmington Gold M. Co. v. Rhymney G. & C. Co., *supra.*

[3] Faxon v. Barnard, 2 McCrary, 44, 4 Fed. Rep. 702; Brown v. Levan (Idaho), 46 Pac. Rep. 661; Gilpin County M. Co. v. Drake, 8 Colo. 586, 9 Pac. Rep. 787; Pollard v. Shively, 5 Colo. 309; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 382.

words: "The objection evidently went to the effect instead of the admissibility of the evidence. If there was no description contained in the notice, nor any attempt to describe the locality or vicinity of the mining claim by reference to some natural object or permanent monument, it might have been excluded by the court; but where the description in the notice is simply defective, it should be left to the jury with the other evidence in the case. We fail to see where the description of the claim falls short of the requirements of the act of congress. The notice informs us that the claim is situated in Silver Bow county; that it is in what is known as Summit Valley mining district; that it is in Park canyon, and on the northerly side of the canyon; and finally that it is about a quarter of a mile from the canyon. The notice then goes on to state that the exterior boundaries of the claim are marked by posts or monuments of stone at each corner of the claim. And from that as a starting point it minutely describes the courses and distances of the boundaries of the claim. . . . How much accuracy is required in this reference to natural objects or permanent monuments is not set forth in the statute, and we are not inclined to think that there must be a strict compliance with the act where there is a *bona fide* effort made to comply with the laws as in this case. The sufficiency of the location by reference to natural objects and permanent monuments should be left to the jury."[1]

It is not for a court to say, by simply looking at a record or declaratory statement or location notice, what are and what are not permanent monuments; that is for the jury to determine.[2] And where a location notice refers to a permanent monument and is recorded in the county in which the claim is situated, the fact that the location notice, after giving the courses and distances which show it to be in one county,

[1] Flavin v. Mattingly, 8 Mont. 242, 19 Pac. Rep. 384.

[2] Russell v. Chumasero, 4 Mont. 309, 1 Pac. Rep. 713; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302; Cullacott v. Cash G. & S. M. Co., 8 Colo. 179, 6 Pac. Rep. 211.

describes it as being in another, will not vitiate the description, and the name of the county will be rejected as surplusage.[1] So a description in a location notice tying the claim to mountain peaks, after naming or describing them, and stating that the claim was on a certain river, near a certain city, and the position of the shaft on a certain creek with relation to a neighboring waterfall, was held sufficiently definite.[2] A description with reference to an adjoining mining claim is a sufficient reference to a permanent monument to allow the notice of location to be introduced in evidence, when it becomes a matter of proof as to whether the adjoining claim is a permanent monument;[3] because, it is said, that, until the contrary appears, the neighboring claim will be presumed to be a permanent monument,[4] and the location notice in such case is not conclusive, but parol evidence is admissible to show whether the natural object or permanent monument is such.[5] So in a late case in New Mexico,[6] overruling the majority and sustaining the dissenting opinion in an earlier case,[7] the supreme court of that territory, after reviewing all the authorities, gave practical effect to the maxim "*id certum est quod, certum reddi potest*," and said: "Within the principle of the maxim, if the notice so offered refers to an object which can readily be resorted to and found by any one interested in knowing whether or not the particular piece has been appropriated, and when found, taking it in connection with the notice, he can ascer-

[1] Metcalf v. Prescott, 10 Mont. 288, 25 Pac. Rep. 1037, and cases cited.

[2] Jackson v. Dines, 13 Colo. 90, 21 Pac. Rep. 918.

[3] Dillon v. Bayliss, 11 Mont. 171, 27 Pac. Rep. 725; Hammer v. Garfield M. Co., 130 U. S. 291; s. c., 6 Mont. 63, 8 Pac. Rep. 153; Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728.

[4] Hammer v. Mining Co., *supra*.

[5] Dillon v. Bayliss, *supra*; Jantzen v. Arizona Copper Co., 20 Pac. Rep. 98.

[6] Seidler v. Lafave, 20 Pac. Rep. 789, supporting Seidler v. Maxfield, id. 794.

[7] Baxter Mt. G. M. Co. v. Patterson (New Mex.), 8 Pac. Rep. 741. See also Gleeson v. Martin White M. Co., 13 Nev. 442; Mt. Diablo M. Co, v. Callison, 5 Sawy. 339; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 675.

tain the existence and extent and *situs* of the claim, it will be held valid."

§ 370. Distinction between notice of location and record — Description and posting — Examples.— It must be borne in mind that wherever the rules of the district require a preliminary notice besides the location certificate, different rules may apply thereto, because it is the record of a mining claim, if any is made or notice recorded, that must refer to natural objects and permanent monuments. The federal statute in terms requires no record, nor does it require the posting of a notice; but where one is required, its main purpose is to acquaint those visiting the ground as to the fact of appropriation. Where the local statutes or rules of the district require a notice, or where they require a notice of a particular kind, they should be substantially complied with. Thus, where a notice of location of a mining claim was by the rules of the district required to refer to a subdivision of the United States survey for boundaries of the claim, and it was shown that a surveyor had been deputized to make this survey, and that he returned field-notes and a map to the land office, which map was approved by the land department, but the commissioner, upon information tending to show that the survey was not made in the field, suspended this proof and ordered an investigation, the court held that the notice was sufficient, if the map may be referred to for a description of the claim, whatever may be the ultimate fate of the survey.[1] As already noticed, a notice of location need not refer to a natural object or a permanent monument — it is the record of the notice that must contain such reference;[2] and where the mining rules of the district require a notice to be posted on the mining claim,

[1] Gird v. California Oil Co., 60 Fed. Rep. 531.

[2] See *ante*, § 367, note 3, p. 336. See also Poujade v. Ryan, 21 Nev. 449, 33 Pac. Rep. 659; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Gleeson v. Martin White M. Co., 13 Nev. 442.

and the notice was put in a tin can which was placed on a shelf in a rock mound, the court held it sufficient.[1]

Stated broadly, the rule seems to be that notices of location, since miners are required to put them up hastily, should be liberally construed, having reference to the circumstances under which, and the character of the parties by whom, they are generally made.[2] If they describe the ground sought to be appropriated in such a way as, taken in connection with the physical marks upon the ground, it can be ascertained with reasonable certainty what is intended, it should be held sufficient.

§ 371. Question of law — An extreme rule — Instances of particular notices held insufficient — Question of fact, the true rule. — It appears to be settled by the great weight of authority that the contents of a location notice is a matter of fact, to be determined the same as any other fact in the case. That there should be no misunderstanding, however, by a failure to reproduce the early cases holding to a different rule, and the extreme cases, it is proper to observe at this time that some courts have taken a different view of the subject from the foregoing. For instance, in a Utah case,[3] following state and federal cases decided in Colorado,[4] a location notice which described the claim as being near the head of the right-hand fork of Dry canyon, about five miles from the Denver & Rio Grande Railroad, in Utah county, Utah territory, giving the size of the claim and its name, and signed by the locators, was held insufficient. It is sufficient to observe, however, that this

[1] Gird v. Oil Co., 60 Fed. Rep. 531; Gleeson v. Martin White M. Co., 13 Nev. 442.

[2] Weill v. Lucerne M. Co., 11 Nev. 200; Farmington G. M. Co. v. Rhymney G. & C. Co., 20 Utah, 363, 59 Pac. Rep. 832; Bennett v. Harkrader, 158 U. S. 441; Gamer v. Glenn, 8 Mont. 371; Wilson v. Triumph Con. M. Co., 19 Utah, 66, 56 Pac. Rep. 300; Wells v. Davis' 22 Utah, 322, 62 Pac. Rep. 8.

[3] Darger v. Le Sieur, 8 Utah, 160, 30 Pac. Rep. 363.

[4] Drummond v. Long, 9 Colo. 538, 13 Pac. Rep. 543; Faxon v. Barnard, 4 Fed. Rep. 702; Gilpin County M. Co. v. Drake, 8 Colo. 586, 9 Pac. Rep. 787.

case, though not overruled, has been departed from in the Utah cases cited in the last preceding section, and the Colorado cases have not been followed. It must be remembered, as already observed,[1] that the federal statute does not require any written notice to be posted upon a location nor to be made in any manner; and, in the absence of any local rule or state statute requiring notice to be posted, a location the boundaries of which are properly marked upon the ground is valid without posting;[2] and where a record is made of the location notice, reference to a known mining claim is a sufficient compliance with the law requiring reference to be made to some natural object.[3]

§ 372. Same subject — Examples of descriptions held sufficient.— In an early federal case a notice which contained no reference whatever to natural objects or permanent monuments was held sufficient;[4] and a notice of location reading, "Commencing at a young black oak tree about 400 feet northerly from an old cross-cut or drift in the ravine, thence running southeasterly to a black oak tree near a small ravine on the north of Turnback creek,"[5] was held a sufficient description of the claim, it being presumed that Turnback creek is a well-known natural monument. A location notice describing a claim as situated on a placer claim, and claiming seven hundred and fifty feet northerly and seven hundred and fifty feet southerly from the notice, was held sufficient.[6] So also a location notice reading, "Beginning at a large boulder at the west end of Tim lode, thence 240 feet to the discovery shaft; thence 1,260 feet west to the East side of the Goldsmith lode; and bounded on the south by the Muldoon lode, on the north

[1] See *ante*, § 370.

[2] Book v. Justice M. Co., 58 Fed. Rep. 106; Perigo v. Erwin, 85 Fed. Rep. 904.

[3] Book v. Justice M. Co., *supra*. See *post*, this Part, ch. IV. See also *ante*, § 369, note 3, p. 339.

[4] Faxon v. Barnard, 2 McCrary, 45, 4 Fed. Rep. 702.

[5] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361; Hammer v. Garfield M. Co., 130 U. S. 291.

[6] Allen v. Dunlap, 24 Oreg. 229, 33 Pac. Rep. 675.

by an unknown claim, and on the east by the Tim lode and on the west by the Goldsmith lode," was held sufficient.[1] So was a notice giving the course of two mountain peaks in degrees and minutes from the discovery shaft.[2]

Thus it would seem that excepting the two Colorado cases cited by Judge Anderson in the Utah case, which have been departed from in all the cases cited in the notes to this section, as well as others, the rule now is that the location notice, if it assumes to and does refer to any monuments, or if the record of such claim refers to monuments, and the location is marked on the ground as required by law, should be admitted in evidence, and if necessary other evidence admitted to explain any doubtful or ambiguous part of it.[3] This is but following the familiar principle that parol evidence is always admissible to explain an ambiguous or incomplete writing.

§ 373. Location notices under supplemental state statutes.— The federal statute authorizes the mining districts to make and enforce rules as to the location, marking and recording of mining claims within certain limitations, not necessary to mention here.[4] This power has been universally considered as extending also to state legislatures. Exercising this power, many of the states have passed laws supplementary to the federal statute, and those which have done so, following the ancient doctrine and the custom of miners, have enacted more or less complete statutes upon the subject. All these state statutes, however, as previously intimated, are supplemental to the federal statute, and in framing them the state legislatures are limited strictly to the powers conferred upon them by congress.[5] These state statutes, so

[1] Gamer v. Glenn, 8 Mont. 371, 20 Pac. Rep. 354. See also Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302.

[2] Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 24.

[3] See *ante*, § 368, note 2, p. 337.

[4] R. S. U. S., § 2324.

[5] Sissons v. Sommers, 24 Nev. 379, 55 Pac. Rep. 829; Eberle v. Carmichael (New Mex.), 47 Pac. Rep. 717; Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; Erhardt v. Boaro, 113 U. S. 527; Mallett v. Uncle Sam M. Co., 1 Nev. 188.

far as they relate to the location notice, may be grouped under two classes: First, those which require a preliminary notice or declaratory statement to be followed by a permanent notice, a copy of which is recorded; and second, those requiring but one notice, a copy of which is recorded. The states of California, Colorado, Idaho, Montana, North and South Dakota and Wyoming and the territory of Arizona are embraced within the former class, while the states of Oregon, Utah and Washington and the territory of New Mexico are embraced within the latter class.[1]

In the states where these statutory provisions exist, the preliminary notice, where one is provided for, must be sufficient to inform the public that the ground is claimed, and it as well as the permanent notice should conform with reasonable certainty to the terms of the statute. In states where the statute requires but one notice, it should in all respects be in substantial compliance with the requirements of the statute. It is the record of the claim.[2] Generally speaking, this notice must be sufficient in form and substance to inform the reader of the name of the claim, the name of its locators, its size and shape, the date of discovery, and the copy which is recorded should refer to natural objects or permanent monuments, as we shall hereafter notice.[3]

§ 374. General rules deducible from all — No notice required by United States law. — As we have previously noticed, there is no provision in the law of congress requiring that a location notice be posted,[4] but notices have

[1] An extract of the various state statutes will be found in Appendix B.

[2] Pollard v. Shiveley, 5 Colo. 309; Erhardt v. Boaro, 113 U. S. 527; Hammer v. Garfield M. Co., 130 U. S. 291; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361; Prince of Wales Lode, 2 C. L. O. 2; Bennett v. Harkrader, 158 U. S. 441.

[3] See *post*, this Part, ch. IV.

[4] See *ante*, §§ 370, 371; Com'r to John E. Elbert, Aug. 19, 1889, 16 C. L. O. 123; Allen v. Dunlap, 24 Oreg. 229, 33 Pac. Rep. 675; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. Rep. 401; Meydenbauer v. Stevens, 79 Fed. Rep. 787; Perigo v. Erwin, 85 Fed. Rep. 905; affirmed, Erwin v. Perigo, 93 Fed. Rep. 608.

been so long recognized, both by miners' rules and state statutes, that they may now be considered as very essential, if not indispensable, notwithstanding this omission.[1] Thus, in Colorado, where a locator had been in a sort of scrambling possession of a mining claim for about four years, having at one time leased a part of it, but not having at any time posted a notice upon it until about four years after discovery, when he undertook to hold it by posting a notice, the notice was held insufficient to vest any title in him as against intervening rights which had accrued in the meantime.[2] Whether the notice as posted be one recognized by miners' rules, the preliminary or permanent notice under state statutes, or a notice devised and used by the prospector independent of both, it is an important function in making his location and cannot be too carefully prepared. Yet, as hereafter noticed,[3] it must be given practical effect, and in construing it the maxim "*id certum est quod, certum reddi potest*," must not be lost sight of.[4]

§ 375. Customary and safer to give notice.— Independent of statute, therefore, and as a means of creating, to some extent, *prima facie* evidence of claim, it would seem to be absolutely essential that one taking possession of mining ground, if not in actual and open possession, should give some notice of the nature, purpose and extent of his claim.[5] Since prospectors have equal rights, the giving of notice describing the nature and extent of the claim is the only way in which one may secure an exclusive right over the other. The observation of such a custom for a long period of time,

[1] Gore v. McBrayer, 18 Cal. 582; Gleeson v. Martin White M. Co., 13 Nev. 442; Copp's Min. Lands (2d ed.), p. 84; Preston v. Hunter, 67 Fed. Rep. 996; Goller v. Fett, 30 Cal. 481; Eilers v. Boatman, 111 U. S. 356, affirming s. c., 3 Utah, 359.

[2] Pelican and Dives M. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. Rep. 266. Compare Hess v. Winder, 30 Cal. 349.

[3] See *post*, this Part, ch. IV.

[4] See *ante*, § 368, note 4, p. 336; § 369, note 1, p. 338.

[5] Hess v. Winder, 30 Cal. 349; Coryell v. Cain, 16 Cal. 573; English v. Johnson, 17 Cal. 115.

even if it had no other foundation, would be sufficient to entitle it to be followed. Moreover, it is so firmly rooted in the mining jurisprudence of the country that it is idle for courts to now say that a location is good, notwithstanding there was no notice of location posted or otherwise given. Miners recognize this as one of the acts in taking up a mining claim, and at this late day a failure to comply with this custom ought not to be tolerated, since it has been regarded as essential by the courts in all the mining states in the West.[1] The rule is thus stated by Mr. Morrison: "That some act of location was required has never been disputed. But in the absence of district rules, what would amount to a sufficient location can only be defined as such acts of appropriation as would amount to a declaration that the locator had appropriated the ground and be sufficient notice to other prospectors that he had so appropriated it."[2]

In the land office procedure for many years it was directed, if not absolutely demanded and required, by the department of the interior, by general circulars of instructions;[3] besides which, as we have attempted to demonstrate, it has the most cogent principles of sound common sense to support it.

[1] Gore v. McBrayer, 18 Cal. 582; Jennison v. Kirk, 98 U. S. 453; Pollard v. Shively, 5 Colo. 509; Kramer v. Settle, 1 Idaho, 485; Kahn v. Old Telegraph M. Co., 2 Utah, 174; Becker v. Pugh, 17 Colo. 243, 29 Pac. Rep. 178. See same case, 9 Colo. 589, 13 Pac. Rep. 906; Harris v. Equator M. Co., 8 Fed. Rep. 863; Cons. Republic Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 345, 12 Pac. Rep. 212; Sullivan v. Hense, 2 Colo. 424; Preston v. Hunter, 15 C. C. A. 148, 67 Fed. Rep. 996; Doe v. Waterloo M. Co., 70 Fed. Rep. 455; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361; Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; Hammer v. Garfield M. Co., 130 U. S. 291; Poujade v. Ryan, 21 Nev. 449, 33 Pac. Rep. 659; Brady v. Husby, 21 Nev. 453, 33 Pac. Rep. 801; Gird v. California Oil Co., 60 Fed. Rep. 531.

[2] Morrison's Min. Rights (8th ed.), p. 22, citing Hess v. Winder, 30 Cal. 349; English v. Johnson, 17 Cal. 106; Atwood v. Fricot, 17 Cal. 38; Gleeson v. Martin White M. Co., 13 Nev. 442; Gonn v. Russell, 3 Mont. 358; United States v. Castillero, 2 Black, 291.

[3] General Circular of Instructions Oct. 31, 1881, secs. 14, 15; Copp's Min. Lands (2d ed.), p. 34; Prince of Wales Lode, 2 C. L. O. 2.

§ 376. No iron-clad rule — Position and manner of posting notice.— Regarding the contents of the notice, however, as has been shown, independent of state statutes, which of course must be substantially followed, no iron-clad rule will be enforced; the notice should be held sufficient if one reading it can be informed therefrom that the ground upon which it is posted is claimed by another.[1] An examination of the state statutes referred to in the preceding sections, and which are set forth in full in the Appendix, discloses a uniform requirement that the notice be posted at or near the point of discovery. The authorities, independent of statute, as we have seen, do not attempt to fix any hard-and-fast rule as to the sufficiency of posting. Almost anything has been held sufficient, from placing the folded paper in a monument of stones[2] or placing it in a tin can,[3] to writing the notice on a tree. The requirements of the state statutes, however, as to the mode and manner of posting the notice are more elaborate in detail and specific in their requirements; and it may be said that a substantial compliance with the local statute or district rule as to manner of making location and posting notice, with the other acts set forth in detail, is essential; not a slavish adherence, however, but a real, substantial following thereof will be required.

Where preliminary notice precedes the location certificate, it is quite manifest that it need not be so complete in all its details.[4] Concerning the contents of the notice — and this applies with equal force to all the acts of location,— the supreme court of the United States recently said: "Obviously the purpose of congress in this act was to secure to those parties in possession of mining claims . . . full

[1] Doe v. Waterloo M. Co., 70 Fed. Rep. 455; Bennett v. Harkrader, 158 U. S. 439; Hammer v. Garfield M. Co., 158 U. S. 442; Morton v. Solambo G. M. Co., 26 Cal. 527; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 56 Pac. Rep. 300.

[2] Donahue v. Meister, 88 Cal. 121, 25 Pac. Rep. 1096.

[3] Gird v. California Oil Co., 60 Fed. Rep. 531.

[4] Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

title thereto, and this notwithstanding their failure to take all the steps required by the general mining laws of the United States with reference to the location of such claims. It was to be expected that, owing to the primitive condition of things in the territory, in the absence of a government survey, and perhaps of persons competent to make accurate surveys, many irregularities and imperfections would exist, and congress intended that the possessor should be secured in his possession and be permitted to perfect a title to the property possessed. Such being the clear import of the statute, it was perfectly proper to introduce the location certificate, however defective in form, for the purpose of showing the time when the possession was taken, and to point out so far as it did the property which was taken possession of."[1]

§ 377. No man may profit by his own wrong — The rule where a locator is prevented by others from completing acts of location — Intruder or trespasser acquires no rights.— The maxim that no person will be permitted to profit by his own wrong-doing, so essential to the administration of justice under the law everywhere, applies with equal force to the law of mining. It controls the locator in all the acts necessary to perfect a location. And where parties who are seeking to establish the location are driven off and prevented from completing the work required to perfect their location, by threats of violence on the part of other persons, so long as the original locators act in good faith they lose none of their rights by reason of such wrongful intrusion upon their property.[2] And therefore, where a person in good faith is attempting to complete his location, and is prevented from doing so by the tortious acts of others, he is excused, to the extent of such interference, but no

[1] Bennett v. Harkrader, 158 U. S. 439.

[2] Erhardt v. Boaro, 3 McCrary, 19, 8 Fed. Rep. 860. This case was reversed by the supreme court of the United States (113 U. S. 527), but upon a different point than the one here under consideration. See also Robinson v. Imperial M. Co., 5 Nev. 43; Boardman v. Thompson, 3 Mont. 387.

farther, from performing acts otherwise necessary under the law. And in such case, any work done or improvements made upon the premises by a wrong-doer would inure to the benefit of the original claimant.[1] This is but another way of stating the rule that an intruder can acquire no rights as against one lawfully entitled to the possession;[2] and it is well settled that the locator of mining property is no more required to remain in actual *possessio pedis* thereof, than he would be in order to establish his title to any other species of real property.[3] Where a purchaser goes into possession before all the acts of location are completed, he may complete them and thus perfect his title.[4]

But, while any act of location carries with it the right of exclusive possession, before such right is perfected, in other words, in order to complete a valid location, the claim must be distinctly marked on the ground and identified in the record, if there is a record.[5] The mere posting of a notice,[6] or the affixing of a location stake, does not constitute a perfect location; the marking of boundaries is essential.[7]

[1] Miller v. Taylor, 6 Colo. 41.

[2] Erhardt v. Boaro, 3 McCrary, 19, 8 Fed. Rep. 860, 118 U. S. 527; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 503, 11 Fed. Rep. 125.

[3] Belk v. Meagher, 104 U. S. 279, 26 L. ed. 739.

[4] Zeckendorf v. Hutchinson, 1 N. Mex. 476, 9 M. R. 488.

[5] Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. Rep. 714.

[6] Newbill v. Thurston, 65 Cal. 419.

[7] Gonn v. Russell, 3 Mont. 358; Holland v. Mt. Auburn M. Co., 53 Cal. 149; Gleeson v. Martin White M. Co., 13 Nev. 442; Newbill v. Thurston, *supra*. For marking boundaries generally, see *post*, § 385 *et seq.*

CHAPTER III.

MARKING THE LOCATION ON THE GROUND.

§ 381. The requirements of the federal statute — Importance, origin.
382. The early rule in California.
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§ 381. The requirements of the federal statute — Importance — Origin.— The provision of the United States statute on this subject is, that "the location must be distinctly marked on the ground so that its boundaries can be

readily traced."[1] The importance of defining surface boundaries has always been recognized and cannot be overestimated. It is the essential prerequisite to acquiring any right under the federal statute. Similar requirements existed in marking the boundaries under the Spanish and Mexican law, concerning which Señor Gamboa says: "After the first discoverer has measured out his boundaries, the rule to be observed in regard to all other persons as to such new discovery is that they shall have their boundary stakes set out in the order in which they make application for that purpose, so that it is the diligence of the party in applying first which entitles him to a preference over the others."[2]

In the tin-bounding in Cornwall and Devonshire,[3] in the "setting out of gales" in the forest of Dean,[4] and the measuring of "meers" in Derbyshire,[5] similar provisions existed; and the early law of France, which is still the law, has substantially the same provision. There the discoverer procures a concession in the nature of a license upon the particular vein discovered, which, when obtained, is measured as length or duration of a stake in the particular mine or within the bounding plane specified in the concession. The power to make this grant embraces the right to fix the bounding planes of the concession.[6]

§ 382. The early rule in California.— The same doctrine was recognized in California and elsewhere on the

[1] 17 Stat. at L., p. 92; R. S. U. S., § 2324.

[2] Gamboa's Com., ch. 8, § 17. See also Id., ch. 8, § 11; Rockw. Mex. Law, pp, 212, 218.

[3] Collier, Mines, pp. 17 to 33; McSwinney, Mines, p. 439; Curtis v. Daniel, 10 East, 273. See also *ante*, §§ 32 to 34 inclusive.

[4] Collier, Mines, p. 18; McSwinney, Mines, p. 482.

[5] Collier, Mines, p. 18; McSwinney, Mines, p. 489; Bishop of Winchester v. Knight, 1 P. Wms. 406.

[6] De Fooz, Mines, pp. 80, 87, 101, 120, 130. "It is in virtue of these powers that it is prescribed in the acts of concession to fix administratively these limits by plain and immovable marks, and that, to this end, it is stipulated that the landmarks shall be placed on all the points serving as bounds where this measure shall be deemed necessary." Id., p. 120.

Pacific coast prior to the enactment of the federal statutes, and was exemplified in the practice of "staking the claim," where the rule was that "one seeking to hold a mining claim by virtue of prior possession alone, without any reference to local mining customs, must mark out his boundaries by such distinct physical marks or monuments as will indicate to any person what his exterior boundaries are."[1] The purpose of thus marking boundaries, then as now, was and is, to apprise all comers entering upon it of the nature and extent of the claim held by the locator.[2] The duty thus cast upon the locator is imperative. He may acquire rights in this way; he can do so in no other.

§ 383. Canadian statutory provisions require the marking of boundaries.— Many of the provinces of the Dominion of Canada have enacted statutory provisions upon the subject of marking boundaries of mining claims. These provisions may be grouped in two general classes: First, those which provide for a survey of the claim by a government surveyor, whose duty is to mark the boundaries of the claim by substantial stakes and visible marks, connecting this survey with some known point in previous surveys, or with some other known point or boundary, after which a map is prepared by him in accordance with such survey, at the cost of the applicant, and filed in the department of crown lands. Second, those which provide that the claims shall be marked by two or more substantial posts, one of which is called the initial post, upon which is marked the name of the claimant and the name of the claim, together with the approximate bearing thence to the other posts of the claim.

The provinces of Ontario,[3] Quebec[4] and Manitoba[5] are

[1] Hess v. Winder, 30 Cal. 349; English v. Johnson, 17 Cal. 107. See also Live Yankee M. Co. v. Oregon M. Co., 7 Cal. 40.

[2] Kelly v. Taylor, 23 Cal. 11.

[3] R. S. Ont. 1897, 61 Vict., ch. XI; 62 Vict., ch. X, § 27; Mines Act of Ontario, ch. 36, § 27.

[4] Mining Law of Quebec, § 5, art. 1429; Act of 1892, 55 and 56 Vict., ch. XX.

[5] Mines Act of Manitoba, 1897, § 8.

embraced within the first class, while the second class contains the provinces of Yukon,[1] Nova Scotia,[2] British Columbia,[3] the Dominion lands of Manitoba and Northwest Territory;[4] and the statutory provision of the province of New Brunswick is not essentially different.[5]

§ 384. Requirements of statute mandatory — Reason of the rule.— It is obvious that the statute is mandatory and that its requirements must be strictly complied with. Upon the correct observance of this provision of the statute, more than upon any other, depend the miner's rights. It is therefore indispensable that the claim shall be so marked upon the ground, whatever means are employed for that purpose, that with the physical marking, taken in connection with incidental evidence depending thereon, the boundaries of the claim can be readily traced.[6] The reason of the rule is obvious, and it is that those seeking to locate in the vicinity may know what is already claimed. As was said by Judge Hallett in an early case: "The government gives its lands to those citizens who may discover precious metal ores therein, upon the condition that they define the sub-

[1] Regulations governing placer mining in the provisional district of Yukon, approved Jan. 18, 1898, §§ 13 and 15.

[2] Act to amend and consolidate the acts relating to mines and minerals, ch. I, § 18.

[3] Placer Mining Act of British Columbia, 1891, ch. 26, as amended 1898 and 1899, p. 8, § 20.

[4] Regulation governing quartz mining claims on Dominion lands of Manitoba and Northwest Territory, approved March 21, 1898, § 12.

[5] Mining Act of New Brunswick, April 16, 1891, p. 13, § 36.

[6] Croesus M. Co. v. Colorado Land & M. Co., 19 Fed. Rep. 78; Funk v. Sterrett, 59 Cal. 613; Taylor v. Middleton, 67 Cal. 656, 8 Pac. Rep. 594; Holland v. Mt. Auburn G. Q. M. Co., 53 Cal. 139; Gelcich v. Moriarty, id. 217; Mt. Diablo M. Co. v. Callison, 5 Sawy. 439, 9 Morr. 616, Fed. Cas. 9,886; Becker v. Pugh, 18 Colo. 248, 29 Pac. Rep. 173; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. Rep. 505; Pollard v. Shively, 5 Colo. 309; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. Rep. 480; Patterson v. Tarbell, 26 Oreg. 29, 37 Pac. Rep. 76, 79; Warnock v. DeWitt, 11 Utah, 324, 40 Pac. Rep. 205; Pharis v. Muldoon, 75 Cal. 264, 7 Pac. Rep. 70; Marshall v. Harney Peak M. & M. Co., 1 S. Dak. 350, 47 N. W. Rep. 290.

ject of the grant with such certainty as may be necessary to prevent mistakes on the part of the government, and on the part of other citizens who may be asking the like bounty."[1]

§ 385. Marking must furnish an index — Not necessary to be placed on the ground itself.— It is quite obvious, as already indicated, that the purpose of the statute is to require such a designation of the ground sought to be claimed as to afford reasonable information on the subject. As was said by the supreme court of California: "The law requires this marking of the claim upon the ground to be done in such a manner that any person of reasonable intelligence may go upon the ground, and readily trace the claim out, and readily find the boundaries and limits of the claim, without instructions, advice or information from any one or thing other than the marking upon the ground, and it is not necessary or required that such a person shall have a copy of the notice of location or necessarily use it in tracing the boundaries of the claim."[2] Nor is it necessary that the markings be upon the ground itself, if they are in sufficient proximity thereto to serve the purpose for which they are intended, that is, designate the exterior boundaries of the claim. Upon this subject we find this language by the supreme court of Montana: "All that the statute requires, in our opinion, is that the land shall be so marked upon the ground that the boundaries can be readily traced. This does not mean that the marks shall be upon the actual ground included within the mining claim, but they may be upon any ground adjoining, near enough to readily designate the boundaries. It was certainly never intended that a slight mistake in setting up stakes should invalidate the location. All that was intended is that a person seeking to make a subsequent

[1] Faxon v. Barnard, 4 Fed. Rep. 702, 2 McCrary, 44. See also O'Reilly v. Campbell, 116 U. S. 418; Jennison v. Kirk, 98 U. S. 453; Jackson v. Roby, 109 U. S. 441; Drummond v. Long, 9 Colo. 448, 13 Pac. Rep. 543.

[2] Willeford v. Bell (Cal.), 49 Pac. Rep. 6, 8. See *post*, § 390.

location could go upon the ground referred to, and from the marks find the boundaries of the claim."[1]

The law itself is specific and need not be misunderstood. The marking is for information of those of equal right, or the would-be locators of the district. Anything which accomplishes this will satisfy the law. Nothing short of it will. And where local statutes prescribe a particular kind of marking, such statutes must be complied with.

§ 386. Sufficiency of marking is a question of fact.— What is or is not a sufficient compliance with the statute upon this subject is a question which is not always easy to determine. The purpose of marking boundaries being, as previously stated,[2] to furnish an index to the claim so as to enable subsequent prospectors to ascertain, from physical marks on the ground, the extent of the claim sought to be held by the previous locator, it would seem to follow that the question as to whether the ground is sufficiently marked is purely one of fact, to be determined the same as any other fact in the case.[3] Thus, in a case where the trial court found as a fact "that said Nabob claim is so marked on the ground that its boundaries could be readily traced," this finding, taken in connection with other specific ones as to the courses and distances, was held decisive of the case upon this question.[4]

§ 387. Same — Exception — Question of law.— There are times, however, when this rule does not apply, as, for

[1] West Granite Mt. M. Co. v. Granite Mt. M. Co., 7 Mont. 356, 17 Pac. Rep. 547. See also Gleeson v. Martin White M. Co., 13 Nev. 462; Anderson v. Black, 70 Cal. 230, 11 Pac. Rep. 700; Taylor v. Middleton, 67 Cal. 656, 8 Pac. Rep. 594; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522.

[2] *Ante*, § 385.

[3] Taylor v. Middleton, 67 Cal. 656, 8 Pac. Rep. 594; Souter v. Maguire, 78 Cal. 543, 21 Pac. Rep. 183; Meydenbauer v. Stevens, 78 Fed. Rep. 787. See also Seidler v. Lafave, 4 N. Mex. 369, 20 Pac. Rep. 791; Farmington G. M. Co. v. Rhymney G. & C. Co., 20 Utah, 363, 58 Pac. Rep. 832; Wells v. Davis, 22 Utah, 322, 62 Pac. Rep. 3; Hammer v. Garfield M. Co., 180 U. S. 291; McKay v. McDougal (Mont., 1901), 64 Pac. Rep. 669.

[4] Eilers v. Boatman, 111 U. S. 356.

instance, where the statute contains certain provisions governing the marking of boundaries, with which the facts show such a total failure of compliance that reasonable men cannot differ. It then becomes the duty of the court to say, as matter of law, that the acts of the locator will not satisfy the demands of the statute.[1] Thus, in an early case in California, where the district rules required that the boundaries be marked by a ditch, with a stake at each of the corners, and the facts showed that none of these acts had been done, the court correctly held that no valid location had been made.[2] The converse of this proposition is equally true, and when the physical marks and notices are such that reasonable men cannot differ as to their sufficiency, the law is satisfied and the court should so declare.[3]

§ 388. Boundaries of placer claims as well as lodes must be marked.— The doctrine is well settled by the courts and by the better line of reasoning in the land office, that the requirements of the statute relative to marking boundaries apply with equal force to placer claims as to lodes.[4] The land office has held that a placer claim, taken by legal subdivisions, need not have its surface boundaries marked,[5] but the supreme court of California announces what would seem to be a better rule. Speaking through Commissioner Hayne they say: "The purpose of the requirement that the claim-

[1] Mangum v. Bullion-Beck & Champion M. Co., 15 Utah, 334, 346, 50 Pac. Rep. 834; Grand Trunk Ry. Co. v. Ives, 144 U. S. 208.

[2] Myers v. Spooner, 55 Cal. 257. See also Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; West Granite Mt. M. Co. v. Granite Mt. M. Co., 7 Mont. 356, 17 Pac. Rep. 547; Gelcich v. Moriarty, 53 Cal. 217. See Sissons v. Sommers, 24 Nev. 379, 55 Pac. Rep. 829.

[3] Eaton v. Norris, 131 Cal. 561, 63 Pac. Rep. 856; Hammer v. Garfield M. Co., 130 U. S. 299; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666.

[4] White v. Lee, 78 Cal. 593, 21 Pac. Rep. 363; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. Rep. 401; Garrard v. Silver Peak Mines, 82 Fed. 90; Schwab v. Bean, 86 Fed. Rep. 41; McCann v. McMillan, 129 Cal. 350, 62 Pac. Rep. 31; Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. Rep. 714; Sweet v. Webber, 7 Colo. 443, 4 Pac. Rep. 752.

[5] Reins v. Murray, 22 L. D. 409.

ant shall mark the boundaries of his claim is to inform other miners as to what portion of the ground is already occupied. The men for whose information the boundaries are required to be marked wander over the mountain with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter-section of a particular number had been taken up. For this reason it is required that the boundaries shall be 'distinctly marked upon the ground.' The construction contended for by the respondent would, in our opinion, defeat the purpose of the requirement."[1]

§ 389. Guiding rules — Some marking necessary — What held sufficient — What not. — There must in fact be some physical marks placed either upon the ground itself or in close proximity to it, sufficient of themselves, or when taken in connection with writings, signs or other marks on the ground, to inform one seeking to identify the claim as to the quantity and identity of the ground claimed.[2] In an early case in California, where the facts showed merely that a notice had been posted at each end of the claim, and that no other marks of any kind had been placed upon it, the court held that inasmuch as this at best merely amounted to marking the two ends of a line, while the statute required the marking of side lines and end lines of the claim, there was not a sufficient marking.[3] This latter case, however, is widely at variance with an early decision by the supreme court of Nevada, where it was held that, in the absence of a local statute or regulation, a stake at each end of the lode line, properly marked, is a sufficient marking of the boundaries of a claim, as the boundaries may be traced from a definitely fixed center line, the vein being the principal

[1] White v. Lee, 78 Cal. 593.

[2] Hess v. Winder, 30 Cal. 349; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522.

[3] Holland v. Mt. Auburn G. Q. M. Co., 53 Cal. 149, 151.

object of the location.[1] The latter case seems the more sound. The position of the California court, if followed, would result in confusion—it cannot be defended; and in such cases the better rule is to submit the question to the jury.

§ 390. Same—How marked—Fencing not necessary—Visible marks sufficient.—No particular kind of marking is required in the absence of local laws or regulations,[2] and how the claim should be marked would, of course, depend in great measure upon the particular circumstances of each case. Where a claim is upon a barren hillside, so that almost any kind of mark or stake would be visible, the locator should not be confined within as strict limits as would be the case where the claim is situated in brush or trees, where more prominent marks would be necessary in order to comply with the spirit of the statute. But any visible marks upon the ground should not be ignored.[3] So trees blazed or squared and marked as stakes, rock monuments, posts, or the prospect hole, are permanent monuments within the meaning of the statute.[4] All that the statute requires is that the location be so marked that its boundaries can be readily traced, and this does not amount to the requirement that the claim be fenced.[5] This last proposition would seem so obvious to any person possessed of common sense and in-

[1] Gleeson v. Martin White M. Co., 13 Nev. 442, 456. See also Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[2] Quimby v. Boyd, 8 Colo. 194, 6 Pac. Rep. 462; Myers v. Spooner, 55 Cal. 257; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; Hess v. Winder, 30 Cal. 349.

[3] North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Hess v. Winder, *supra*.

[4] Hansen v. Fletcher, 10 Utah, 266, 37 Pac. Rep. 480. And a description giving other claims for boundaries, if such claims themselves be properly marked, is sufficient. Russell v. Chumasero, 4 Mont. 309, 1 Pac. Rep. 713. See also Eilers v. Boatman, 3 Utah, 159; affirmed, 111 U. S. 356; Warnock v. De Witt, 11 Utah, 324, 40 Pac. Rep. 205.

[5] English v. Johnson, 17 Cal. 107; Rogers v. Cooney, 7 Nev. 213. See also Garrard v. Silver Peak Mines, 82 Fed. Rep. 578; Hess v. Winder, *supra*.

clined to look to the reason of the rule, and the nature and purpose of the estate in mining claims, namely, the location of the lode, the surface being merely an incident, that we would not consider it necessary to advert to it at all were it not that the question has been raised and given serious consideration in both the states of California and Nevada.

§ 391. Same subject — Cases where marking was held sufficient — Absolute certainty not required. — In a recent case in Utah, the court held that where a location is made upon a barren hillside, the posting of notice at each of the four corners of the location, or building stone monuments so as to keep the stakes in place, is sufficient if the locality is referred to by means of natural monuments or other known locations, so that the claim can be found and readily traced upon the ground, and is in accordance with the local rules and laws.[1] In another Utah case[2] it was held that the locator is not bound to be absolutely exact in marking his boundaries on the ground. If he marks them with reasonable certainty, and so that all comers may know what is sought to be claimed, it is sufficient.

So in a case in the federal court where the locator of a mining claim planted a permanent stake at the discovery shaft and posted thereon a notice giving the nature and extent of his claim, and that it commenced at the center of a shaft about a quarter of a mile northerly from "Queen Bee Hill," and from thence gave specific directions and distances from monuments marked with the name of the claim, it was held to be distinctly marked upon the ground so that its boundaries could be readily traced within the meaning of the statute, and was a sufficient compliance therewith.[3]

[1] Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 56 Pac. Rep. 300. See also Pollard v. Shively, 5 Colo. 309; Stemwinder M. Co. v. Emma and Last Chance M. Co., 2 Idaho, 421, 21 Pac. Rep. 1040; Justice M. Co. v. Barclay, 88 Fed. Rep. 554.

[2] Eilers v. Boatman, 8 Utah, 159.

[3] North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522. See also Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96, 11 Fed. Rep. 666; Doe v. Tyley, 73 Cal. 21, 14 Pac. Rep. 375.

§ 392. Same—What should be included—Actual markings on the ground control over description in location notice.— The extra-lateral rights of the locator depend upon the correct marking of the surface. It is therefore important that the surface boundaries should include the apex and the entire strike of the vein, so far as the locator intends to claim it,[1] it being well settled that the subsurface rights of the locator, that is, his right to pursue the vein on its downward course, will be measured by the lines as laid on the surface.[2] The federal court has announced a rule, which must be the correct one, that markings actually made upon the ground control distances and courses set out in the description of a recorded notice of location, where there is a conflict between the two descriptions;[3] and while the supreme court of Montana has announced that the boundaries of the claim and the record must correspond with each other,[4] we apprehend that a failure on the part of the locator to comply with this mandate would merely invoke the application of the rule just stated.

§ 393. Time within which boundaries must be marked—State statutory provisions—Who may take advantage of failure to mark.— In nearly all of the mining states there are statutory provisions regulating the time within which a locator of a mining claim must mark his boundaries. These statutes are all set forth at length in the Appendix, and therefore it will not be necessary to make further reference to them here. In the absence of state statutory pro-

[1] McCornick v. Varnes, 2 Utah, 855.

[2] King v. Amy & Silversmith M. Co., 9 Mont. 543, 24 Pac. Rep. 200; s. c., 152 U. S. 220; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196. See also Tombstone M. Co. v. Way Up M. Co. (Ariz.), 25 Pac. Rep. 794; Flagstaff M. Co. v. Tarbet, 98 U. S. 463; Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 8, 11 Pac. Rep. 515.

[3] Meydenbauer v. Stevens, 78 Fed. Rep. 787. See also Cullacott v. Cash G. M. Co., 8 Colo. 179, 6 Pac. Rep. 211; Book v. Justice M. Co., 58 Fed. Rep. 106; Garrard v. Silver Peak Mines, 82 Fed. Rep. 578.

[4] Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. Rep. 714.

visions or district rules, it may be stated generally that the locator is allowed a reasonable time within which to perfect his location, including the marking of its boundaries. What is a reasonable time has been the subject of much discussion by the courts, and conclusions somewhat at variance with each other have been reached by the different courts. Thus, in an early case in California where the facts showed that the locator had posted a notice upon the vein claiming one thousand feet one way and five hundred feet the other way on the vein, from his notice, and also claiming twenty days within which to mark his boundaries, whereupon he left the district in question, returning to his camp, giving as his reason for not marking his boundaries that he had been prevented by illness from doing so, although it appeared that during that time he had visited other mining claims in the vicinity, the supreme court of California held that the twenty days claimed was not a reasonable time and the intervening rights of others would prevail as against his attempted location.[1]

In Oregon, where the testimony of the first locator showed that after discovery of mineral upon the claim he had gone to Baker City to procure the services of a surveyor to mark his boundaries, and during his absence a subsequent claimant appeared and performed the acts of location, including the marking of boundaries, the supreme court held the subsequent locator to be entitled to the premises.[2]

The circuit court of appeals for the ninth circuit seems unable to agree with the California court in the case just cited.[3] Upon practically the same state of facts as those which were before the California court, it was held that twenty days was not an unreasonable time to be allowed the locator within which to complete the marking of his boundaries.[4] It seems to us that this latter case is more in har-

[1] Newbill v. Thurston, 65 Cal. 419, 4 Pac. Rep. 409. But see Doe v. Waterloo M. Co., *infra; ante*, § 358.

[2] Patterson v. Tarbell, 26 Oreg. 29, 37 Pac. Rep. 76.

[3] Newbill v. Thurston, *supra*.

[4] Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 190. See also Erhardt v. Boaro, 118 U. S. 527.

mony with the true intent and spirit of the statute. Of course the question as to what is a reasonable time is, after all, largely one of fact, depending upon the peculiar circumstances of the case. But since the locator of a mining claim must stand upon his location as made, and can take only what is claimed by his surface boundaries, his extra-lateral rights being defined and determined by his lines as thus drawn,[1] it would seem to follow that he ought to be given a reasonable time within which to determine the course of his vein so as to enable him to intelligently fix his boundaries.[2] And a subsequent locator cannot object that the boundaries of the first location were not marked in time, provided they are sufficiently marked before his location.[3]

§ 394. When boundaries may be changed.— It is a well-settled rule of law that when boundaries are once established, they may not thereafter be changed so as to in any manner affect intervening rights. Of course, during the period fixed by the statute or district rules for establishing boundaries, the locator may so alter the position of his stake as to locate any fifteen hundred feet on the lode which includes his original discovery.[4] When stakes are set and boundaries firmly fixed, however, they are conclusive as to intervening rights, and may not be changed to the injury of an intervening locator who has staked out his claim with reference to them.[5]

There are some decisions which seem to sanction the moving of boundary stakes during the statutory period within

[1] King v. Amy & Silversmith Cons. Co., 152 U. S. 222.

[2] *Ante*, § 392, note 2.

[3] Crown Point G. M. Co. v. Crismon (Oreg., 1901), 65 Pac. Rep. 87.

[4] Erhardt v. Boaro, 113 U. S. 527; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 654; Doe v. Waterloo M. Co., 17 C. C. A. 190, 70 Fed. Rep. 455; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666.

[5] North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522, 6 Sawy. 299; Jupiter M. Co. v. Bodie Cons. M. Co., *supra;* Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463. See also *post*, § 429.

which the final discovery work, marking of boundaries and recording of the claim is to be done, even though the intervening rights of others would be injuriously affected thereby.[1] But the soundness of this rule may well be doubted. As said by the supreme court of the United States: "The location must be distinctly marked on the ground, with all the care possible; the end lines marked on the surface will often vary from a right angle to the true course of the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary claim should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment according to the subterranean developments made by the mine owner. . . . The rule, whatever hardship it may work in particular cases, should be settled, and thus prevent, as far as practicable, such uncertainty. If the first locator will not or cannot ascertain the true course of the vein, and draws his lines ignorantly, he must bear the consequences."[2]

§ 395. Correcting insufficient marking — Markings by trespasser — Effect of. — Upon the same principle that amendments are permitted to be made to the location notice generally,[3] it is well settled that even though the original marking may be imperfect or inadequate, if, before the intervention of adverse rights, the marking be corrected, such corrections will validate the claim from the date of such correction, if not from the date of the original location.[4] It has also been decided, following well-known prin-

[1] Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1037. The Montana court cites Erhardt v. Boaro, 113 U. S. 527, as authority for this position, but we think a careful examination of this case will disclose that, while it goes to the extreme length, it does not decide that the locator has the right to use his discovery shaft as a pivot from which to shift his surface boundaries to the injury of intervening locators.

[2] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196. See also King v. Amy & Silversmith M. Co., 152 U. S. 222, 225.

[3] *Post*, this Part, ch. V.

[4] North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666.

ciples of law, that where a claim is correctly marked by a trespasser the true discoverer may adopt such marking as his own.[1]

§ 396. **Proof of boundary stakes.**— Proof of the marking of boundaries and staking the claim may be made the same as any other fact in the case, either by the testimony of witnesses who assisted in the marking of the boundaries, or the testimony of persons who saw the claim as marked. The positive testimony of witnesses who saw the stakes on the ground is, of course, entitled to greater weight, aside from any question of credibility, than the negative testimony of witnesses who failed to find such stakes.[2] But the testimony of an eye-witness to the putting up of a stake is not necessary where it appears that the witness saw the stake after it was put up; and, in the absence of proof to the contrary, it will be presumed that a monument once established has not been removed.[3] And the testimony of an engineer who surveys a claim, to the effect that a certain "compromise" monument was pointed out to him, which monument he used as an initial point from which to begin his survey of the claim, is competent,[4] especially in view of the fact that all parties had observed this monument as a correct division line and as being properly placed.

§ 397. **Excessive boundaries — Effect of.**— It not infrequently occurs that the locator of a mining claim, either through inadvertence or because not in possession of adequate means of measuring his claim, so lays his surface lines that they include more ground than the maximum amount allowed by statute.[5] This is very apt to occur where the location is laid upon a steep hillside, or where the under-

[1] Miller v. Taylor, 6 Colo. 41.

[2] McEvoy v. Hyman, 25 Fed. Rep. 596.

[3] Doe v. Waterloo M. Co., 55 Fed. Rep. 11.

[4] Stemwinder M. Co. v. Emma and Last Chance Cons. M. Co., 2 Idaho, 421, 21 Pac. Rep. 1040.

[5] As to size of claims: Lode, see *ante*, § 280; Placer, *ante*, § 315; Lode in placer, *ante*, § 320; Mill sites, *ante*, § 324.

growth is so abundant as to make it impracticable, if not impossible, to lay the lines with accuracy. What effect this has upon the validity of the location has been the subject of considerable judicial discussion. The consensus of opinion is to the effect that the claim should be held valid to the extent of the maximum size allowed by law, and void as to the excess.[1] But the supreme court of Montana has reached a different conclusion from this, holding that the boundaries must be so definite and certain that they can be readily traced and within the limits authorized by law, or their purpose and object would be defeated; and that, inasmuch as no one would be required to look outside the limits of the location for its boundaries, stakes or monuments which are outside such limits would not impart any notice and would be equivalent to no boundaries at all.[2]

The supreme court of Idaho, on the other hand, has reached a conclusion somewhat more liberal than the Montana court, holding that if the excessive boundaries are the result of innocent error, the claim should be held valid, except as to the excess which is rejected; but if the excessive boundaries are laid with fraudulent intent the entire claim is void.[3] As indicated in the beginning of this section the latter rule seems the sound one.

§ 398. Same subject — Prevailing doctrine that claim is void only as to excess.— The supreme court of the United States, however, as well as several of the state courts, have announced the doctrine, founded upon strong reason and the controlling equities of the situation, that such excessive claim, either in length or width, renders it void only as to

[1] Richmond M. Co. v. Rose, 114 U. S. 576; Howeth v. Sullinger, 113 Cal. 547, 45 Pac. Rep. 841; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. Rep. 505; Eilers v. Boatman, 3 Utah, 159, 2 Pac. Rep. 66. See also authorities, § 398, *post*.

[2] Leggett v. Stewart, 5 Mont. 107, 2 Pac. Rep. 320; Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. Rep. 714.

[3] Burke v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49; Stemwinder M. Co. v. Emma & Last Chance Cons. M. Co., 2 Idaho, 421, 21 Pac. Rep. 1040.

the excess.[1] And it seems to us that this must be the true rule. It is not to be expected that miners will in all cases be, nor are they expected to be, strictly accurate in marking their claims. They may be entirely without facilities for measuring their claims, being compelled to rely upon their ability to correctly estimate the distance by stepping it off, and when we take into consideration the rugged state of the mountain sides upon which most mining claims are located, it is easy to see that strictly correct boundaries are extremely difficult, if not impossible; and to hold, as the Montana court does, that because the locator thus inadvertently includes more ground within his surface boundaries than is allowed by law the entire claim is void, is to lose sight of the maxim that the law does not require impossibilities. As said by the supreme court of the United States: "We can see no reason, in justice or in the nature of the transaction, why the excess may not be rejected, and the claim held good for the remainder, unless it interferes with rights previously acquired."[2]

The principal obstacle to be encountered in applying the doctrine enunciated by the Idaho court, as we view it, is that it would be a very difficult matter to ascertain in a particular case whether the excessive boundaries were laid with fraudulent intent. The court certainly could not say as matter of law that they were so laid, and if the question is considered one of fact we hardly see just how it would be proved. And, after all, what object has the locator to attempt to include more ground in his location than is authorized by law. When he makes his location he has the

[1] Richmond M. Co. v. Rose, 114 U. S. 576; Parley's Park S. M. Co. v. Kerr, 130 U. S. 256; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 7 Sawy. 96. See also English v. Johnson, 17 Cal. 107, 118; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. Rep. 505; Patterson v. Hitchcock, 3 Colo. 533, 543; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. Rep. 480; Eilers v. Boatman, 3 Utah, 159; Doe v. Sanger, 83 Cal. 203, 23 Pac. Rep. 365; Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, Fed. Cas. No. 4,548. See *ante*, § 114.

[2] Richmond M. Co. v. Rose, *supra*. See also Doe v. Sanger, *supra*.

statute staring him in the face, and knows that whenever he applies for a patent to his claim he will then be restricted to the amount authorized by law. We think the Idaho court had the correct understanding of the matter, and reached the conclusion, which should have been followed in the later cases, when it said, speaking through Chief Justice McBride: "If he claims more than the law allows it is void for the excess. . . . To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it."[1] As said by the supreme court of California: "In such case the location is good for as much as the party is entitled to hold and void for the excess only."[2]

§ 399. **Maintaining boundaries.**— The authorities are practically unanimous to the effect that when boundary stakes are once properly and firmly established, there is no requirement in the law that the locator or his assigns maintain them in such state.[3] But, inasmuch as proof of their identity is required at the time of application for patent,[4] and since such proof can only be certainly and correctly made when the boundary stakes have been maintained and preserved, common prudence at least would seem to dictate that, until the issuance of patent, the boundary stakes should, if possible, be preserved, although, as previously stated, the mining claimant is not bound to preserve them.

§ 400. **Summary — Doctrine of this chapter restated.**— The conclusions deducible from the foregoing may be thus summarized:

The statute requires that the location shall be distinctly

[1] Atkins v. Hendree, 1 Idaho, 107. This case is not disapproved in the later Idaho cases (note 4, § 397, *ante*); neither is it approved. See reference to Idaho statutes, § 114, *ante*.

[2] Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182. See also Howeth v. Sullenger, 113 Cal. 547, 45 Pac. Rep. 841; Wolfley v. Lebanon M. Co., 4 Colo. 112.

[3] McEvoy v. Hyman, 25 Fed. Rep. 596; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96, 11 Fed. Rep. 666; Byrne v. Slosson, 29 L. D. 48.

[4] See *post*, Part X, chs. I and II.

marked upon the ground so that its boundaries can be readily traced.

That in the absence of local law, rule or regulation providing for a specific mode of marking, any marks which, in connection with signs or notices, will serve to indicate with reasonable certainty the ground sought to be claimed, will be held sufficient; whence it follows that in such cases corner-posts are not necessary.

That most of the states and territories have enacted statutes under the power conferred by section 2324 of the Revised Statutes of the United States, pointing out how such marking must be done, which is generally by stakes set at each corner or angle of the claim. Some state statutes, as, for example, Colorado and the Dakotas, require the stakes to be hewed on the side towards the claim, and marked with the name of the claim and the number of the post, or at least its relative position.

These requirements, being within the authority of state legislatures conferred by congress, and reasonable within themselves, must be complied with.

In nearly all the states this marking is required to be done within a specified time, and these statutes are mandatory as to the marking, but directory as to time, in the absence of adverse rights.

One in possession endeavoring in good faith to determine the strike of his vein, in order to mark his boundaries so as to include the apex thereof for the length allowed by law, has a reasonable time in which to so mark his location on the ground; and where a statute fixes a specified time in which to do this, he has all that time, and sufficient in addition thereto, if no conflicting rights are invaded by the delay in marking, to accurately mark his claim.

That if he is interfered with or prevented from so completing his location by hostile and tortious acts of adverse claimants, the time he is prevented thereby shall not be counted against him. And marking made by any hostile claimant will inure to his benefit.

CHAPTER IV.

RECORDING THE NOTICE, CERTIFICATE OR CLAIM.

§ 403. General preliminary observations.
404. No express provision for record in federal statutes — Some decisions holding recording not essential.
405. Record clearly implied — Safer to record.
406. Record required in Cornwall and France and under Spanish and Mexican ordinances.
407. Record is the inception of the paper title — Place of record must be public.
408. Same — Necessity for record — Place of record.
409. Contents of record.
410. Same subject — Contents of the record — Requirements under state and district laws substantially the same — Purpose of the record.
411. Reasonable certainty is generally required — Question of fact as to sufficiency of record.
412. Sufficient if can be made certain — Immaterial error will not vitiate.
413. Same — Examples of descriptions which have been held sufficient.
414. Must refer to natural objects or permanent monuments — What are sufficient for this purpose.
415. Same — Instances of sufficient reference — Presumption as to permanent monuments — Record should be liberally construed.
416. Sufficiency of reference to natural object or permanent monument is a question of fact — Parol evidence to aid record.
417. Same — Statutory provisions on the subject — Question of fact — Force of statutory requirements.
418. Time within which record must be made — Effect of failure to record in time — Recording before posting.
419. Proof of record — Effect of mistakes of recorder.
420. Of the state statutes requiring location notices and declaratory statements to be sworn to — Legislative power as to, reviewed.
421. Same subject — Verification of notice — Acknowledgment — Montana decisions examined — Legislation close to the border line between valid and the void — Unsigned verification — Undated notice — Time.
422. Same subject continued — Law requiring verification held valid.
423. Doctrine of this chapter restated.

§ 403. General preliminary observations.— The statute[1] requires that "All records of mining claims hereafter made shall contain the name or names of the locators, date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." It will thus appear that the statute does not, in express terms, require a record to be made, but merely provides what it must contain when it is made, in order to have any force or effect. This has led to the conclusion on the part of several courts[2] that these provisions are only directory. And while this may be true, we think that when all the circumstances and the reasons which congress had for passing the law are taken into consideration, it will be apparent that the framers of the federal statute clearly intended that there should be a record. If this is not true there would be no necessity to say what the contents of the record must be.

It is the common experience of miners and mining lawyers that the location and acquisition of mining ground cannot be surrounded by too many safeguards in order to prevent the shifting of the boundaries and the changing of the *locus* of the claim. When a record is made in substantial compliance with the requirements of the statute it becomes a matter of history, and thereafter the question as to how much and what ground is embraced in the particular location is definitely fixed and settled. While there may be other claims in the particular mining district bearing the same name as the one thus located and recorded, it will be impossible to find one which is an exact duplicate as to description in the record and location notice. We think, for this reason and others which we will state in later sections of this chapter, that courts ought to hesitate before declaring, as matter of law, that no record whatever is necessary. Besides, as we shall notice later, the record possesses a further value as the foundation of the paper title.

[1] R. S. U. S., § 2324. [2] See cases cited in § 404, *post*.

§ 404. No express provision for record in federal statute — Some decisions holding recording not essential. — As stated in the last section, there is no express provision in the United States statute that any record must be made. The supreme court of California, in referring to this statute, has held that the fact that the notice was not recorded is immaterial, in the absence of local rule or custom requiring it,[1] and this is substantially the same conclusion that was reached by the supreme court of Nevada, where it was held unnecessary to prove any record of the claim; the court further saying, in effect, that no record is required by United States law, the only requirement of the statute being that, where there is a record, it must, to have any effect, together with other essential requirements, contain an accurate description of the claim, by such reference to natural objects and permanent monuments as that the claim may be easily identified.[2] So the federal court has, on several occasions, held that the statute does not require any record of location, but merely provides, when one is made, what it must contain in order to be of any effect;[3] and this is substantially the rule announced by the supreme courts of Montana,[4] Colorado,[5] New Mexico and Oregon.[6]

§ 405. Record clearly implied — Safer to record. — Notwithstanding these decisions, and admitting that no record

[1] Souter v. Maguire, 78 Cal. 548, 21 Pac. Rep. 188; Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182; Carter v. Bacigalupi, 88 Cal. 187, 23 Pac. Rep. 361.

[2] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; Brady v. Husby, 21 Nev. 458, 33 Pac. Rep. 801.

[3] Meydenbauer v. Stevens, 78 Fed. Rep. 787; Book v. Justice M. Co., 58 Fed. Rep. 106; Haws v. Victoria M. Co., 160 U. S. 303.

[4] Freezer v. Sweeney, 8 Mont. 508, 21 Pac. Rep. 20; Flick v. Gold Hill L. & M. Co., 8 Mont. 298, 20 Pac. Rep. 807; Gamer v. Glenn, 8 Mont. 371, 20 Pac. Rep. 654. And in an early case, a record was excluded from admission in evidence because not required by law. Moxon v. Wilkinson, 2 Mont. 421.

[5] Quimby v. Boyd, 8 Colo. 194, 6 Pac. Rep. 462, 467.

[6] Allen v. Dunlap, 24 Oreg. 229, 33 Pac. Rep. 675; Seidler v. Lafave, 4 New Mex. 369, 20 Pac. Rep. 789.

is necessary under United States law, the safest and undoubtedly the correct course, the one intended, must be to record the notice. The minuteness with which directions are given as to what "all records of mining claims hereafter made" shall contain implies an absolute confidence and expectation on the part of the law-making power that record will be made. As said by an early law writer on this subject: "There is nothing in the general law requiring a record to be made of the location; but the statute seems to take it for granted that this will be required by local laws or regulations."[1] As said by the supreme court of Nevada: "The mining law allows the miners to provide for the recording of claims, and no doubt it was the intention of congress that such record should have some practical effect."[2] This record when made should be in such compliance with the statute regarding the reference to natural objects and permanent monuments, as well as the other statutory directions, that, taken in connection with the marking on the ground, already noticed,[3] it will be sufficient to inform others coming upon the ground and seeking to make locations, precisely what is taken and what is left unappropriated and open for them to take. But in this, as in all the other acts constituting a valid location, substantial and not technical accuracy is all that is required; substance will never be sacrificed to mere form.[4]

[1] Wade on Mining Law, § 27, citing R. S. U. S., § 2324; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312. And this presumption is strengthened by the fact that the notice must be recorded before a survey for patent will be made. Phillip Dephanger, 1 L. D. 581; City Rock Lode v. King of the West Lode, 1 C. L. O. 146.

[2] Golden Fleece M. Co. v. Cable Cons. M. Co., *supra*. See also Argentine M. Co. v. Benedict, 18 Utah, 183, 55 Pac. Rep. 559. The supreme court of the United States has clearly recognized the necessity for a record. Campbell v. Rankin, 99 U. S. 261. See also Sweet v. Webber, 7 Colo. 443, 4 Pac. Rep. 752.

[3] *Ante*, §§ 387 *et seq.*

[4] Gamer v. Glenn, 8 Mont. 371, 20 Pac. Rep. 754; Talmadge v. St. John, 129 Cal. 430, 62 Pac. Rep. 79; Book v. Justice M. Co., 58 Fed. Rep. 106; Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1037; Argentine M. Co. v. Benedict, *supra*. See also Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439, 17 Fed. Cas. 918; *post*, § 409.

§ 406. Record required in Cornwall and France and under Spanish and Mexican ordinances.— It has been an immemorial custom, wherever mining has been carried on, to preserve some record of the claim to title. It was so in Cornwall, the records being preserved in the stannary court.[1] It was the rule in France, where the record was made with the commissaries of arrondissement and the burgomasters;[2] and in Mexico, and all other places where the Spanish law has prevailed, the custom of registering, which is the equivalent of our system of recording, has for more than three hundred years been constantly observed, so that it has come to have the force and effect of common law upon the subject.[3] Under this law the manner of acquiring title to a new mine was by registration, a distinction from the manner of acquiring title to an old mine, or the unclaimed parts of one already discovered, which was by denouncement.[4] A strict compliance with the provisions of the law was required as a matter of public policy, because the mines of a country like Mexico are a great source of revenue to the government, and because a strict compliance with the registry laws tends to prevent fraud and false swearing, and to promote order and good understanding among miners holding and working contiguous prospects.[5]

§ 407. Record is the inception of the paper title — Place of record must be public.— The record of the location notice is the inception of the paper or record title, and amounts to a publication of the location; hence the term "location certificate," adopted by most of the states. It is the place to which parties may look to ascertain what ground

[1] McSwinney, Mines, pp. 430, 431, 438; Bainbridge, Mines, 519; Coll. Mines, ch. IV, p. 136.

[2] De Fooz, Mines, p. 111,

[3] United States v. Castillero, 67 U. S. 1, 17 L. ed. 388.

[4] Mining Law of Mexico revised to 1899, § 3, art. 17. See also Id., §§ 4 and 5; Hal. Col., pp. 409, 441; 1 Gamboa, ch. 5, p. 150; United States v. Castillero, *supra*.

[5] United States v. Castillero, *supra*. And this is the law as it still remains in force in that republic. Mining Law of Mexico revised to 1899, § 3, art. 17.

is claimed and by whom it is claimed. The supreme court of Colorado classes a recorded certificate of location as a statutory writing affecting realty, being in part the basis of the miner's right of exclusive possession and enjoyment of his mining claim.[1] The state statutes usually require the record to be kept by the county recorder, as the register or recorder of deeds is usually called.[2] In addition to this the district rules and several of the state statutes also require that the notice be recorded in the office of the district mining recorder.[3] It is apparent from these provisions, as also from the general nature of the transaction, that these records should be kept in a public place, and where the recorder of a mining district kept the record of location notices in a memorandum book in his pocket, the federal court correctly held that this was not a public record, and hence not a compliance with the requirements of the statute.[4]

§ 408. Same — Necessity for record — Place of record. The necessity for some record of a mining location, in some public manner, has come to be so universally and extensively recognized in the public-land states and territories that it has been elevated almost, if not quite, to the dignity of a common-law custom. Indeed, some of the mining customs have been repeatedly recognized by judicial decisions to the extent that they may now be said to have become a part of the common law of the land.[5] As to the place of record

[1] Pollard v. Shively, 5 Colo. 309, 312. See also Argentine M. Co. v. Benedict, 18 Utah, 183, 55 Pac. Rep. 559; Faxon v. Barnard, 4 Fed. Rep. 702, 2 McCrary, 44.

[2] Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; In re Monk, 16 Utah, 100, 50 Pac. Rep. 810; Kramer v. Settle, 1 Idaho, 485; 9 Morr. Min. Rep. 561; Conner v. McPhee, 1 Mont. 78, 9 Morr. 570; Stapleton v. Pease, 2 Mont. 550; Hays v. Lavagnino, 17 Utah, 195, 53 Pac. Rep. 1029; Jantzen v. Arizona C. Co. (Ariz.), 20 Pac. Rep. 93; Moore v. Hammerstag, 109 Cal. 122, 41 Pac. Rep. 805.

[3] See the various state statutes as set forth in Appendix B. See also authorities cited in note 2, *ante*.

[4] Fuller v. Harris, 29 Fed. Rep. 814.

[5] Correa v. Frietas, 42 Cal. 339; Jackson v. Roby, 109 U. S. 440; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Jennison v. Kirk, 98 U. S. 453.

referred to in the last section, it may be said that the land office has held it necessary to record the notice of location in the office of the recorder of deeds in the county where the claim is situated, where the claim is not situated in a regularly organized mining district.[1] This would seem to be the general rule.[2] It would seem to us that the safer course would be to record it in the office of the county recorder in all cases, the county recorder being the custodian of all the public records of the county. As said in the last section, this is required by many of the state statutes. Where a record was made in the county records in the first instance, and omitted from the district records, it has been held sufficient.[3] But obviously the safe course is to comply with local rule or law and record in the place thus designated.

§ 409. Contents of record.— "Recording the claim," as understood in mining parlance, usually includes the recording of the declaratory statement, as it is called in some states, the location certificate, and also the copy of the preliminary notice required by some state statutes and district rules. It is usually the custom in mining districts to make the location notice in duplicate in the first instance, one of which is posted in a conspicuous place upon the claim, and the other filed for record, either with the district recorder or the county recorder of the county, according to the provisions of the statute or district rule. As previously intimated,[4] this notice, so far as the description of the claim is concerned, should be in substantial compliance with the statute so far as it relates to the reference to natural objects and permanent monuments; besides which it should contain the name and date of the location, and an accu-

[1] Rose Lodes Nos. 1 and 2, 22 L. D. 88. See also Walter C. Childs, 10 L. D. 173.

[2] Hays v. Lavagnino, 17 Utah, 185, 53 Pac. Rep. 1029; Campbell v. Rankin, 99 U. S. 261; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312. See also Yale, Mining Claims and Water Rights, p. 80.

[3] Johnson v. McLaughlin, 1 Ariz. 496, 4 Pac. Rep. 130.

[4] *Ante*, § 405.

rate description of the *locus* of the claim.[1] This record is for the miner's benefit and protection. Therefore, the laws governing and controlling his conduct relating to it should be so construed as to advance the remedy and protect his rights.[2] As said by the supreme court of Montana: "The purpose of the record is to direct the inquirer to the place where the claim is located, and not to show its precise boundaries as marked upon the ground. It must contain enough, taken in connection with these boundaries, to enable a person of reasonable intelligence to find the claim and trace its boundaries."[3]

§ 410. Same subject — Contents of the record — Requirements under state and district laws substantially the same — Purpose of the record.— As to the contents of the record there is no substantial difference between the requirements of the federal statute and those of state statutes and district rules made under the authority of the act of congress. The federal statute[4] contains all the requirements which ought to be necessary to constitute a valid record of the claim in any case, and the state statutes, as a rule, merely declare substantially in the language of the federal statute.[5] While the record of the location notice is the inception of the paper title,[6] it does not of itself constitute title, proof of title, nor the possessory right to the ground to which it relates. "It is purely a creature of the statute, and, under the evident legislative intent, its purposes and functions are twofold: when duly recorded, it becomes

[1] Fuller v. Harris, 29 Fed. Rep. 814, 818.

[2] *Ante*, § 405, note 4. See also Pollard v. Shively, 5 Colo. 309; Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; Gleeson v. Martin White M. Co., 13 Nev. 442; Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135; Red Pine Lode, id. 162; Hansen v. Fletcher, 10 Utah, 267, 37 Pac. Rep. 480; Bennett v. Harkrader, 158 U. S. 441; Weill v. Lucerne M. Co., 11 Nev. 200.

[3] Gamer v. Glenn, 8 Mont. 371, 20 Pac. Rep. 654.

[4] R. S. U. S., § 2324.

[5] Id.; Drummond v. Long, 9 Colo. 538, 13 Pac. Rep. 543; Campbell v. Rankin, 99 U. S. 261; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312. See also *ante*, § 407.

[6] *Ante*, §§ 403, 407.

notice to the world of the facts therein set forth, namely,—a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground,—and is thus constructive notice of the claimant's possession."[1] Besides this it is one of the essential elements of a valid location.[2] The record itself is proof of the performance of this requirement, which is the last step in perfecting the location.

§ 411. Reasonable certainty is generally required — Question of fact as to sufficiency of record.— Applying to this matter the general rule as to recorded instruments, the courts have usually held that a reasonable certainty in reference to the calls in the description of the claim and the reference to natural objects and permanent monuments should be required of the locator.[3] Of course, the reason for this is apparent, as the value and effect of the record depend entirely upon the accuracy with which the claim is described and the substantial compliance with the requirements of the statute.[4] Applying this doctrine at an early day, the supreme court of Utah, it seems to us, went rather farther than was necessary. The record of the notice of location described the claim as being situated "up near the head of the right-hand fork of what is known as Tie Canyon, about five miles from the Denver & Rio Grande Railroad, in Utah county, Utah territory." And the court held the record and location notice fatally defective.[5] The court based its decision in this case upon the ground that the no-

[1] Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111.

[2] Id.; *ante*, §§ 405–407.

[3] Brady v. Husby, 21 Nev. 453, 33 Pac. Rep. 801; Kahn v. Old Telegraph M. Co., 2 Utah, 174; Gamer v. Glenn, 8 Mont. 371, 20 Pac. Rep. 654; Hammer v. Garfield M. Co., 130 U. S. 291.

[4] Drummond v. Long, 9 Colo. 533, 13 Pac. Rep. 543; R. S. U. S., § 2324.

[5] Darger v. La Sieur, 8 Utah, 160, 30 Pac. Rep. 363. See also Faxon v. Barnard, 4 Fed. Rep. 702; Drummond v. Long, 9 Colo. 538, 13 Pac. Rep. 543; Gilpin M. Co. v. Drake, 8 Colo. 586, 9 Pac. Rep. 787; Clear Water Short Line R. R. Co. v. San Garde (Idaho), 61 Pac. Rep. 187; McEvoy v. Hyman, 25 Fed. Rep. 596.

tice contained no sufficient reference to the railroad as a permanent monument, because it did not state in what direction the claim was from the railroad, and that a designation of the claim as being "up near the head" of a canyon is too indefinite. The first position is sound and in accordance with the rules of other courts, but we think that whether or not the description of the claim, with reference to the head of the canyon, was sufficient, is a question of fact to be determined the same as any other fact in the case.[1] We will discuss this matter further in a subsequent section.[2]

§ 412. Sufficient if can be made certain — Immaterial error will not vitiate.— As already stated,[3] technical accuracy is not required. The courts are generally inclined, in the construction of the record of location notices, as well as in other branches of the law, to apply the maxim, "*id certum est quod, certum reddi potest.*"[4] As said by Judge Hillyer: "The object of any notice being to guide a subsequent locator and afford him information as to the extent of the claim, . . . whatever does this fairly and reasonably should be held a good notice. . . . The locator should make his location so certain that the miners who follow him may know the extent of his claim and be able to locate the unoccupied ground without fear of entering upon appropriated territory. But '*id certum est quod, certum reddi potest.*' When the miner has stated, as the rules require, the number of feet he claims along the lode on which he has set his stake, and has referred all whom it may concern to the laws of the district, . . . and those laws in express terms entitle each locator to a certain number of feet, then the length and breadth of his claim are fixed with a reasonable certainty; because, by reading the

[1] See *post*, §§ 413 *et seq.*; *ante*, § 371.

[2] See *post*, § 416.

[3] *Ante*, § 405, note 4, p. 372.

[4] Book v. Justice M. Co., 58 Fed. Rep. 106; Mt. Diablo M. Co. v. Callison, 5 Sawy. 439, 17 Fed. Cas. 918; Seidler v. Lafave, 4 N. M. 369, 20 Pac. Rep. 789; Seidler v. Maxfield, 4 N. M. 374, 20 Pac. Rep. 794; Gleeson v. Martin White M. Co., 13 Nev. 442; Talmadge v. St. John, 129 Cal. 430, 62 Pac. Rep. 79.

laws of the district with the notice referring to them, the subsequent locator can make certain the exact thing claimed."[1]

§ 413. Same — Examples of descriptions which have been held sufficient.— In Montana a location certificate, sufficient in other respects, which described the claim and gave its *locus* as Lewis and Clark county, while it was in fact in another county, the description, however, designating it as bearing a certain distance in a given direction from an established mineral survey, was held a sufficient description to go to the jury with other evidence in the case.[2] So, in California, where the final notice required by the statute failed to name the state or county wherein the claim was situated, but did refer to the preliminary notice, which had previously been recorded as required by law, and which did give the name of the county, the record was held sufficient.[3] The record of a claim which fails to state the number of feet claimed, where it is in compliance with the law in other respects, is admissible in evidence.[4] So also a notice of location describing the claim by metes and bounds, as so many feet in a given direction from another known claim, is sufficient.[5]

§ 414. Must refer to natural objects or permanent monuments — What are sufficient for this purpose.— The importance of making a record in the first instance having

[1] Mount Diablo Mining Co. v. Callison, 5 Sawy. 439, 17 Fed. Cas. 918. See also Seidler v. Lafave, 20 Pac. Rep. 789. It seems to us that if the Utah court (*ante*, § 411, p. 377, note 5) had applied this doctrine, it would have been able to conclude, as the trial court did, that the location notice should be admitted in evidence for what it was worth; and if, aided by parol evidence, it could have been made definite and certain, such evidence should have been admitted. See next section and § 415, *post*.

[2] Metcalf v. Prescott, 10 Mont. 383, 25 Pac. Rep. 1037. See *ante*, § 369.

[3] Talmadge v. St. John, 129 Cal. 430, 62 Pac. Rep. 79.

[4] Conner v. McPhee, 1 Mont. 73.

[5] Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. Rep. 153; affirmed, 130 U. S. 291.

been heretofore pointed out,[1] it is essential that we ascertain exactly what is required by the statute in this respect. As to what is a natural object or permanent monument within the purview of this section,[2] there has been an extensive discussion by the different courts. The purpose of the statute requiring a reference to a permanent monument being to give one seeking to identify a recorded claim something in the nature of an initial point from which to start,[3] it would seem apparent that whatever is sufficient to serve this purpose, whether it be reference to a neighboring mountain peak,[4] another known mining claim,[5] the confluence of creeks,[6] a cliff of rocks,[7] trees blazed,[8] or, in fact, anything which will serve as an initial point from which any one honestly seeking, in good faith, to ascertain the boundaries of the claim, may begin and trace them out, aided by a copy of the location notice or record, is sufficient for this purpose.[9]

§ 415. Same — Instances of sufficient reference — Presumption as to permanent monuments — Record should be liberally construed. — The tendency on the part of the courts, in the construction of records, is almost universal toward giving them a liberal construction, with a view, if it

[1] *Ante*, §§ 403-405 *et seq.*

[2] R. S. U. S., § 2324.

[3] Drummond v. Long, 9 Colo. 538, 13 Pac. Rep. 548.

[4] Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 24; Drummond v. Long, *supra*, and cases cited. See also Flavin v. Mattingly, *infra*; Brown v. Levan (Idaho), 46 Pac. Rep. 661.

[5] Book v. Justice M. Co., 58 Fed. Rep. 106; Garfield M. Co. v. Hammer, 6 Mont. 53, 8 Mont. 153; Smith v. Newell, 86 Fed. Rep. 56.

[6] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361.

[7] Farmington G. M. Co. v. Rhymney G. & C. Co., 20 Utah, 363, 58 Pac. Rep. 832.

[8] Quimby v. Boyd, 8 Colo. 192, 6 Pac. Rep. 462; Carter v. Bacigalupi, *supra*.

[9] Flavin v. Mattingly, 8 Mont. 242, 19 Pac. Rep. 384; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 56 Pac. Rep. 300; Seidler v. Lafave, 4 N. M. 369, 20 Pac. Rep. 789. See also Russell v. Chumasero, 4 Mont. 309, 1 Pac. Rep. 713; Hauswirth v. Butcher, 4 Mont. 209, 1 Pac. Rep. 714; Red Pine Lode, 1 C. L. O. 162; Jantzen v. Arizona C. Co., 20 Pac. Rep. 93.

is possible to do so, of holding the location to be valid.[1] It has been held that reference to the discovery shaft of the claim itself and calling by metes and bounds for its own stakes firmly set is sufficient reference to a natural object or permanent monument to entitle the location notice to be admitted in evidence;[2] it will then resolve itself to a matter of proof as to whether the shaft referred to is in fact a permanent monument, and of this subject we will speak in the next section. Pursuing this doctrine, the supreme court of California, in a recent case, held that it will be presumed that the natural objects or permanent monuments referred to are better than any others in the vicinity, or others would have been used.[3] Where reference is made to another known location, it will be presumed that such location is a permanent monument.[4]

§ 416. Sufficiency of reference to natural object or permanent monument is a question of fact — Parol evidence to aid record. — It is the general practice in mining communities, where the record contains any reference whatever to natural or permanent objects, to allow it to be admitted in evidence, whereupon its sufficiency becomes a question

[1] Hammer v. Garfield M. & M. Co., 130 U. S. 291; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 7 Sawy. 96; Duryea v. Boucher, 67 Cal. 141, 7 Pac. Rep. 421; Duncan v. Fulton (Colo. App.), 61 Pac. Rep. 244; Jackson v. Dines, 18 Colo. 90, 21 Pac. Rep. 918; Riste v. Morton, 20 Mont. 139, 49 Pac. Rep. 656, 659; Farmington G. M. Co. v. Rhymney G. & C. M. Co., 20 Utah, 363, 58 Pac. Rep. 882; Wells v. Davis, 22 Utah, 322, 62 Pac. Rep. 8.

[2] North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299. See also Duncan v. Fulton, *supra;* Hammer v. Mining Co., *supra;* Flavin v. Mattingly, 8 Mont. 242, 19 Pac. Rep. 384. In Jackson v. Dines, *supra*, the location was described by reference to "mountain peaks," without naming or describing them, but further referred to the claim as being on the Arkansas river near Taber City, with a shaft or cut one hundred feet from the south line on the left bank of a small creek called Chalk creek, and the court held the notice sufficient.

[3] McCann v. McMillan, 129 Cal. 350, 62 Pac. Rep. 31. See also Talmadge v. St. John, 129 Cal. 430, 62 Pac. Rep. 79.

[4] Hammer v. Mining Co., *supra*. See also Duncan v. Fulton, *supra*.

of fact to be determined the same as any other fact in the case.[1] And it is not the best or only evidence, parol evidence being admissible to explain or supply any defect or omission, the same in this as in all other cases.[2] Upon this subject we find this language by the supreme court of Montana: "A court could not find from the inspection of the notice that such description was an impossible or uncertain one. . . . The face of the notice does not set forth the corners or figures of the Nine Hour or St. Louis claim. It does not appear from the notice but that the surface lines of these claims were such that the Kilbys reference to them would have been certain when one went upon the ground and observed their lines, and the Kilbys conformation to them. . . . We are of opinion that there was no error in admitting the location notice in evidence."[3] And again: "If there was no description contained in the notice, or attempt made to describe the locality or vicinity of the mining claim by reference to some natural object or permanent monument, it might have been excluded by the court. But, where the description contained in the notice is merely defective, it should be left to the jury with the other evidence in the case."[4]

The supreme court of Utah, in a recent case, while not making any reference to it, departed entirely from its former position,[5] and held that the sufficiency of the reference to natural objects or permanent monuments is one of fact, and that mere imperfections in the location notice will not render it void.[6]

[1] Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1037; Metcalf v. Prescott, 10 Mont. 283, 25 Pac. Rep. 1037; Brady v. Husby, 21 Nev. 453, 33 Pac. Rep. 801; Hammer v. Garfield M. & M. Co., 130 U. S. 291.

[2] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522. See *ante*, § 371.

[3] Dillon v. Bayliss, 11 Mont. 171, 27 Pac. Rep. 725, 727. See also Drummond v. Long, 9 Colo. 539, 13 Pac. Rep. 543.

[4] Flavin v. Mattingly, 8 Mont. 242, 19 Pac. Rep. 384, cited in Brady v. Husby, 21 Nev. 453. See also Gamer v. Glenn, 8 Mont. 371, 378, 20 Pac. Rep. 654.

[5] Darger v. Le Sieur, 8 Utah, 160, cited in § 411, *ante*.

[6] Farmington G. M. Co. v. Rhym-

It will thus be seen that the record of the location certificate or notice is generally admissible as *prima facie* evidence, *pro tanto*, of a compliance with the statute. But it is not the only evidence; and not only may defects and ambiguities be corrected by parol testimony, but where it is contested, parol evidence must be resorted to to show that all the acts of location were performed, as required by statute.[1]

§ 417. Same — Statutory provisions on the subject — Question of fact — Force of statutory requirements. — Thus, it would seem that the statute is best subserved by not holding the miner to an absolutely rigid compliance with the statute. He is not expected to employ a surveyor in the first instance to locate the boundaries of his claim, and if the record contains some description of the claim by reference to natural objects and permanent monuments, the notice should be admitted in evidence; and the question whether these are permanent monuments, sufficient as such to designate the claim, and from which one can go upon the ground and identify the claim sought to be located, may be determined the same as any other fact in the case.[2]

Most of the state statutes have provided that unless the record is made at the time and in the manner pointed out it is absolutely void.[3] The later decisions which have had occasion to construe these statutes hold such provisions to be valid and binding, and that it is necessary to comply with them whether they provide a penalty or not.[4] But as

ney G. & C. Co., 20 Utah, 363, 370. See also Erhardt v. Boaro, 118 U. S. 527; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 56 Pac. Rep. 300.

[1] Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111. Where the certificate, for any of the reasons set forth in the statute, is deemed void, it has been held admissible, in connection with a valid amended certificate correcting the defects of the original. Id., citing Van Zandt v. Argentine M. Co., 2 McCrary, 159, 8 Fed. Rep. 725.

[2] *Ante*, § 416. See also Anderson v. Black, 70 Cal. 226, 11 Pac. Rep. 700.

[3] See state statutes in Appendix B.

[4] Sissons v. Sommers, 24 Nev. 379,

seen hereafter,[1] a notice of the location, or the record of it, will not be held invalid by reason of failure to comply with the statute, unless adverse rights have intervened. But it is said these statutes will not be extended beyond the exact letter. Thus in an early case in Montana, where no provision was made in the statute for placer claims, it was held that they did not come within the provision of the law relative to lode claims.[2]

§ 418. Time within which record must be made — Effect of failure to record in time — Recording before posting. — All of the state legislatures have enacted statutes requiring a record. All of these statutes prescribe a time within which this record must be made. But while they are mandatory on the question of a record in the first instance, they are directory merely, so far as they relate to the time for making the record, provided no adverse rights have intervened in the meantime.[3] Even where adverse rights have intervened, unless they are founded upon a valid location and compliance with the law, they will be of no avail. As said by the supreme court of Colorado: "If this claim subsequently became liable to relocation by reason of the failure of Omar and his co-owners to record their location certificate within (the statutory time), such default did not inure to the benefit of the appellees, since, as we have seen, they neither made nor attempted to make a relocation."[4]

In the absence of any mining rule prescribing a forfeiture

55 Pac. Rep. 829; Eberle v. Carmichael, 8 New Mex. 69, 42 Pac. Rep. 95. See also Mallett v. Uncle Sam M. Co., 1 Nev. 188, 204.

[1] *Post*, § 419.

[2] Moxon v. Wilkinson, 2 Mont. 421.

[3] Preston v. Hunter, 67 Fed. Rep. 996, 15 C. C. A. 148; Faxon v. Barnard, 2 McCrary, 44, 4 Fed. Rep. 702; Van Zandt v. Argentine M. Co., 8 Fed. Rep. 725; Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111; Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 724; McKay v. McDougall (Mont., 1901), 64 Pac. Rep. 668; Power v. Sla (Mont., 1900), 61 Pac. Rep. 468, and cases cited.

[4] Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 448. See also Kendall v. San Juan S. M. Co., 144 U. S. 658; McGinnis v. Egbert, 8 Colo. 46, 5 Pac. Rep. 652.

for failure to record a claim within a specified time, a locator in the actual possession, and working his claim, will be protected in such possession, even though he does not record his location within the time required.[1] In this, as in all other cases, the right to claim a forfeiture for failure to comply with the recording statute may be waived unless asserted.[2] The mere fact that a notice is recorded before it is posted will not invalidate it.[3]

§ 419. Proof of record — Effect of mistakes of recorder.— The record books of a mining district as well as those of the county are admissible in evidence as tending to prove compliance with the law;[4] and the record itself is *prima facie* evidence of compliance with the statute and the correctness of the record.[5] It is also presumptive evidence of a valid location,[6] including discovery and all the other essential and necessary acts constituting a valid location.[7] A location notice when properly recorded, and which shows a substantial compliance with the statute and district rules in all other respects, has the effect of segregating the ground described in it from the public domain.[8] Where a location is made in accordance with law, and duly filed with the recorder of the district, or county, or both, the locator cannot be injured by any acts of the recorder in failing to properly copy such notice into his records.[9]

[1] English v. Johnson, 17 Cal. 107; Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182; Erhardt v. Boaro, 113 U. S. 527. See also McEvoy v. Hyman, 25 Fed. Rep. 596; Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1037.

[2] Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. Rep. 153; affirmed, 130 U. S. 291, 32 L. ed. 964.

[3] Thompson v. Spray, *supra*.

[4] Flaherty v. Gwinn, 1 Dak. 509; Pralus v. Pacific G. & S. M. Co., 35 Cal. 30.

[5] Kramer v. Settle, 1 Idaho, 485.

[6] Cheesman v. Hart, 42 Fed. Rep. 98; Jantzen v. Arizona C. Co. (Ariz.), 20 Pac. Rep. 93; Atwood v. Fricot, 17 Cal. 38; Kramer v. Settle, *supra*.

[7] Cheesman v. Shreeve, 40 Fed. Rep. 787; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; Jupiter Mine, 4 C. L. O. 114.

[8] Piru Oil Co., 16 L. D. 117.

[9] Myers v. Spooner, 55 Cal. 257; Kelly v. Taylor, 23 Cal. 11; Weise

§ 420. Of the state statutes requiring location notices and declaratory statements to be sworn to — Legislative power as to, reviewed.— California, Montana and Idaho have statutory provisions requiring the location notices or declaratory statements to be sworn to before they are recorded. In Montana, where this provision has received the most attention, it has provoked a very extensive discussion *pro* and *con*, its constitutionality, and the power of the legislature to enact it, having been doubted at various times. It may now be considered, however, to be the settled law of Montana. But while this is true, the circumstances which have brought it about, and the decisions of the court in connection with it, may be examined with profit. But before doing so it may not be improper to say that, while a state legislature or the miners of a district may enact reasonable rules governing the location, and make compliance with them a condition precedent to a valid location, yet they are valid and binding only to the extent that they are reasonable and in harmony with the federal statute. When they impose conditions which in their effect work an extreme hardship, almost impossible of performance, they may be considered as encroaching upon the peculiar and sole prerogative of congress, and to the extent that they do so encroach, by imposing conditions impossible or extremely difficult of performance, they are null and void. Of course this raises a relative question itself difficult of solution, but one which it is believed can safely be left to a court and jury of the vicinage.

No better evidence of the vice of such a statute can be found, it is thought, than has confronted the supreme court of Montana in a recent case,[1] where the court found it necessary to become technical regarding the verification of the declaratory statement. This verification stated that the description of the lode as given in the notice was true and

v. Barker, 7 Colo. 178, 2 Pac. Rep. 919; Preston v. Hunter, 67 Fed. 834, 40 Pac. Rep. 602. Rep. 996.

[1] McCowan v. McLay, 16 Mont.

correct, and that the locators had in every respect complied with the requirements of the law (stating it) and the local rules and customs respecting mining locations. The court decided this to be a verification of the description but not of the notice. It seems to us, with becoming deference to this court and the learned judge who wrote the opinion, that the court adopted a very narrow and restricted view of the law in that case. And while it contented itself by saying that it would not disturb the law, it should, in justice to itself at least, have adopted a broader view of the law, and enlarged rather than restricted its letter to meet its spirit, which must be, as indicated in the previous sections of this chapter, to protect the miner, and not to hamper him with useless and unnecessary technical requirements in order to secure the block of mining ground which is his birthright, and to which he is entitled upon substantial compliance with the law of the government which confers the right, unhampered by any narrow and sometimes impossible conditions sought to be imposed by local authority.[1] We are not unmindful of the principle of law which authorizes the law-making power of every jurisdiction to prescribe, within reasonable limits, the *quantum* and character of the evidence which shall or may be received by its courts in the determination of a controversy. But wherever, as in this case, that power is restricted by a greater one, it becomes necessary to mark well the environment and see to it that the legislation does not go beyond the power thus conferred, and little by little its provisions be thus wasted, until all that is of benefit in the original is gone. Moreover, it must be remembered that the power to so legislate is not conferred by state constitution nor territorial enabling acts, but by the law of congress authorizing district rules.[2]

[1] See especially authorities cited in notes to §§ 405, 409, *ante*.

[2] R. S. U. S., § 2324. See also In re Monk, 16 Utah, 100, 50 Pac. Rep. 810.

§ 421. Same subject — Verification of notice — Acknowledgment — Montana decisions examined — Legislation close to the border line between the valid and the void — Unsigned verification — Undated notice — Time. — When the question discussed in the last section first came before the Montana court,[1] it was held by McConnell, C. J., speaking for the court, that the provisions of the Montana statute were sufficiently complied with by making and filing for record the declaratory statement upon information and belief, supplied by an agent and joint locator who had first seen and discovered the lode. The excuse for permitting such an easy compliance with the statute is found in the circumstance that the court doubted the validity of the legislation.

In a later case,[2] which was twice before the court, upon the first appeal it appeared that the location notice contained the date but the verification did not. The question to be determined was whether the section of the federal statute[3] requiring "that all records of mining claims hereafter made shall contain the name or names of the locators, the date of location," etc., and the provisions of the statute of the territory of Montana, which required the declaratory statement to be under oath, describing the claim as required by the laws of the United States, were sufficiently complied with. Speaking on the question the court said: "Without the oath the statement is good, and with it it is fatally defective. This brings us face to face, for the first time, with the constitutional question whether the territorial legislature is not prohibited by the organic act from passing the act under consideration. Section 1851, Revised Statutes of the United States, provides that 'the legislative power of every territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States, that no law shall be passed interfering

[1] Wenner v. McNulty, 7 Mont. 30, 14 Pac. Rep. 643.

[2] O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302.

[3] R. S. U. S., § 2324.

with the primary disposition of the soil.' The act in question is not inconsistent with the laws of the United States. It simply imposes additional duties and burdens upon the locators of mining claims upon the public mineral lands of the United States. The simple question is, whether it is such interference with the primary disposition of the soil as to come within the act of congress. We think it is not."

It seems to us that this is not the only question. But rather that it is, as said in the last section, whether local legislation may so limit or attach conditions to congressional legislation as to have the effect of denying the privileges sought to be conferred thereby. This law was sustained as the law of the case upon the second appeal,[1] and was followed as *stare decisis* in a later case,[2] where the facts showed the verification to be in due form but was in fact unsigned, and the question was whether this rendered the verification invalid. The court, after calling attention to the foregoing decisions, and the result of the adjudication thereon, used this language: "This court, after incidentally doubting the validity of the law of the territory requiring the location notice to be verified, . . . afterwards . . . met the propcsition squarely and held the law to be good. While we can see doubts as to this power of the territorial legislature, we do not feel it our duty to disturb . . . a position established by that rule. We therefore sustain the law."

The validity of this legislation was doubted at another time by Justice De Wolf, who used this language: "As to the recital that the locators had located a vein or lode with at least one well-defined wall, it is unnecessary to determine here whether the legislature of the territory had authority to ingraft a requirement of this kind upon the act of congress governing the location of claims or veins, lodes or ledges, and whether such enactment is not in conflict with the organic act of the territory, which prohibits the territo-

[1] O'Donnell v. Glenn, 9 Mont. 452, 24 Pac. Rep. 1018.

[2] Metcalf v. Prescott, 10 Mont. 284, 25 Pac. Rep. 1037.

rial legislature from passing any law which interferes with the primary disposition of the soil. The legislation is at least of doubtful authority."[1]

This question was at least incidentally presented to the supreme court of the United States,[2] but was not decided, the case having been reversed on other grounds. Touching the question, however, the court in the opinion said: "It is not necessary to express an opinion whether, after the passage of the act of congress of 1872, the legislature of the territory could add any further requirements touching a record of the notice of location."

Judge McConnell, in the Montana case, took the language of Judge Field just quoted as intimating that they might have done so before the passage of the act of 1872; and the just inference is, that he based his decision upholding the validity of this statute upon that ground, the Montana statute having been passed in 1865 or 1866, was recognized as an existing condition and law before the passage of the act of congress, and might be classed as of the same dignity, at least, as would be district rules, although this could really make very little if any difference.

This question came before the circuit court of appeals for the ninth circuit in April, 1895,[3] upon an appeal from a judgment where the following conclusion of law was made: "That the alleged location of the Pine Tree placer claim, mentioned and described in the answer in this action, is, and at all times has been, invalid and void for the reason that the declaratory statement thereof in the recorder's office did not contain the date of the location; and that therefore the defendant is not the owner of, or entitled to the right of possession of, the premises in controversy, or any part thereof, and is not entitled to recover in this action."

This conclusion of law was based upon a finding of fact reciting, *inter alia*, that the locators, naming them, being

[1] Flick v. Gold Hill M. Co., 8 Mont. 298, 20 Pac. Rep. 807.

[2] Hoyt v. Russell, 117 U. S. 401, 29 L. ed. 914.

[3] Preston v. Hunter, 67 Fed. Rep. 996, 15 C. C. A. 148.

citizens, etc., entered the premises, located the same as placer mining claims, marked the location upon the ground so that its boundaries could be readily traced, posted a notice describing the claim, which was signed by all of them and duly witnessed; that they filed a declaratory statement thereof acknowledged in the usual form of acknowledgment. The question for determination, it will be seen, was whether an acknowledgment to the declaratory statement will fill the same requirement as a verification. The court, after collecting the Montana decisions upon the subject, proceeded to say: "No oath was attached to the notice; simply an acknowledgment of the execution of the notice. If the case rested here, we would be compelled to decide the question whether the statute of Montana which imposes an additional burden upon the locators of a mining claim to that required by section 2324 of the Revised Statutes of the United States is not inconsistent with the organic act creating the territory of Montana, which prohibits the legislature from passing any laws interfering with the primary disposition of the soil. . . . This constitutional authority on the part of the legislature was questioned in (one case),[1] declared to be constitutional in (another),[2] again doubted,[3] . . . but the court refused to disturb the rule established in the Glenn case; but from the views we entertain of this case it is unnecessary to decide that question. Conceding, for the purpose of this opinion, that the record made within twenty days after the location of the claim was wholly insufficient, yet the question remains as to the sufficiency of the record made as set forth in the third finding of the court."

The court then proceeds to reverse the case upon the ground that a sufficient and valid declaratory statement was filed after the twenty days, and uses this language, which is undoubtedly a correct statement of the law: "The mere failure to record the declaratory statement within the stat-

[1] Wenner v. McNulty, 7 Mont. 80.
[2] O'Donnell v. Glenn, 9 Mont. 452.
[3] Metcalf v. Prescott, 10 Mont. 284.

utory time does not render the location of the claim invalid where there are no intervening rights before the record is properly made, if there has been a full compliance with the law in other respects."[1]

§ 422. **Same subject continued — Law requiring verification held valid.**— As we have already intimated, by technical ruling and a very narrow margin, it may now be considered as the settled law of Montana that the statute requiring a declaratory statement to be upon oath is not invalid. Yet the language used in settling the question, and the extent of doubt raised by many of the decisions themselves, leaves the matter open to very grave question whether it will remain settled. Upon principle we think it ought not to be so, and this view is sustained by the extremely technical position taken by the court in the cases we have mentioned.[2] In one case[3] the location notice itself was signed by the locator, but the verification was not, but it said that Charles K. Cole, being first duly sworn, etc., testified to it, and it was signed by the notary and had his seal affixed. It has been repeatedly held that affidavits need not be signed by the affiant.[4] In the case last above cited, counsel offered to prove, *aliunde*, that the oath was in fact taken, and the court in passing upon the question cited a Montana case[5] where a jurat to a deposition was held not to be the statutory certificate, and then said: "If under those circumstances the notary certified to nothing except

[1] Preston v. Hunter, 67 Fed. Rep. 996, citing, which see, Faxon v. Barnard, 2 McCrary, 44, 4 Fed. Rep. 702; Van Zandt v. Argentine M. Co., 2 McCrary, 169, 8 Fed. Rep. 725; Omar v. Soper, 11 Colo. 330, 18 Pac. Rep. 448; McEvoy v. Hyman, 25 Fed. Rep. 596. See also on this latter question, Power v. Sla (Mont., 1900), 61 Pac. Rep. 486; McKay v. McDougall (Mont., 1901), 64 Pac. Rep. 669.

[2] Metcalf v. Prescott, 10 Mont. 384, 25 Pac. Rep. 1037; McCowan v. McLay, 16 Mont. 234, 40 Pac. Rep. 602.

[3] Metcalf v. Prescott, *supra*.

[4] Shelton v. Berry, 70 Am. Dec. 326; Jackson v. Virgil, 3 Johns. 540; Ede v. Johnson, 15 Cal. 55; Burns v. Doyle, 28 Wis. 460; Christ v. Parks, 19 Tex. 234.

[5] Murray v. Larabie, 8 Mont. 208, 19 Pac. Rep. 574.

that the deposition was subscribed and sworn to, then we must hold that in the case at bar the simple signature of the notary, without even the jurat, . . . did not certify to anything. We are of the opinion that the paper above used is not intrinsically a declaratory statement on oath. . . . The statute requires that the locator shall make and file a declaratory statement on oath. It shall not only be made on oath, but filed for record on oath. We are of the opinion that the statute intends that the oath shall be a part of the record. . . . We believe that any other view would open the door to abuses and mischievous errors."

In a late case[1] it was admitted that the declaratory statement itself was sufficient in form. But the verification was "John C. O'Brien, James L. Neihart and Samuel R. Harley, being duly and severally sworn, depose and say that they are of lawful age and citizens of the United States; that they have heard read the above notice of location of 1,500 feet of the Yellow Jacket Lode; that the description of said lode as therein given is true and correct; that they have in every respect complied with the requirements of (the statute)[2] and the local customs and laws regulating mining locations, and that they are three of the within-named locators." (Subscribed and sworn to.) And this is what the court say: "The notice is a declaratory statement, but the question is, Do the locators or any of them make the statement under oath? We are of the opinion that they do not. They make only one portion of it under oath, and that is that the description of the lode, as given in the notice, is true and correct." The court then goes on to say that the other matters contained in the affidavit are mere conclusions of law, and while this is perhaps technically correct, still they were doubtless intended as conclusions of fact and as statements of the ultimate facts. It has lately been held by that court that an allegation "that (on a certain day) he caused a record notice to be made," is not a sufficient

[1] McCowan v. McLay, 16 Mont. 234. [2] Ch. VI, title 32, R. S. U. S.

allegation of compliance with this statute requiring a verified declaratory statement to be filed for record in the county recorder's office.[1]

All these technical rulings lead to the conclusion either that the law is itself wrong, or that the interpretation of it by the court is wrong, for it certainly cannot be right to impose such hardships upon the locator. Moreover, it is next to impossible to reconcile the conclusions of the court with the general and controlling principles of the law as above indicated.[2]

§ 423. **Doctrine of this chapter restated.**— It thus appears that while the statute of the United States, strictly construed, does not require any record of a mining claim to be made, still, by plain inference at least, it was expected, if not intended, by the framers of the federal statute, that a record should be kept in all cases; that it is competent, under the power conferred by section 2324, for state legislatures, and, in case of their silence, the miners of the district, to make reasonable laws and regulations upon this subject; and that many, if not all the states and territories, have enacted supplemental statutes upon the subject. It further appears that the federal statute and nearly all state and district laws require that the record refer to such natural objects or permanent monuments as will identify the claim; that what are such objects and monuments is generally a question of fact; and that in absence of proof to the contrary, adjoining or non-adjoining patented or known claims will be presumed to be such permanent monuments; that trees blazed or marked, confluence of streams, the junction of roads, mountain peaks and canyons, are all to be considered as such. It further appears that by some statutes the final location certificate, notice or declaratory statement is required to be verified, and that a very strict con-

[1] Power v. Sla (Mont., 1900), 61 Pac. Rep. 468. See also McKay v. McDougall (Mont., 1901), 64 Pac. Rep. 669.

[2] Metcalf v. Prescott, 10 Mont. 284.

struction of this statute has been adopted by the supreme court of Montana. It further appears that most of the statutes provide for a record to be made within a given time, but that this statute, while mandatory as to the record itself, is only directory as to time, and, in the absence of intervening rights, a record made at a subsequent time will be held sufficient; that, otherwise than this, these statutes are valid and binding rules, and are enacted to be obeyed and followed.

CHAPTER V.

AMENDMENTS AND ADDENDA.

§ 425. Additional certificates and amendments — Preliminary observations—State statutory authority—Doctrine of relation—Change of boundaries.
426. Same subject — State statutes — When amendment will relate to original date.
427. Same subject — Colorado authorities discussed — General purpose and effect of amendments — Relation — Certificate — Overlapping dead claim.
428. Amendment or *addendum* to notice — Record and marking independent of statute — How far permissible.
429. Cannot affect intervening rights — Estoppel by first record.
430. Uninjured subsequent locator cannot complain — Amendment as to description.
431. Amendment made before expiration of location period cannot be questioned.
432. The doctrine of this chapter restated.

§ 425. Additional certificates and amendments — Preliminary observations — State statutory authority—Doctrine of relation — Change of boundaries.— Amendments in the form of *addenda* have always been approved and given effect by the land department; and, acting upon this practice, locators have gone to considerable length in making amendments or *addenda*.

Where the actual boundaries of a claim are not established, or where the purpose of the amendment or *addendum* is to more accurately describe the claim and tie it to permanent monuments, no valid objection can be made to it. The statute, as we have had occasion to remark, requires that the location shall be marked on the ground, and, when this is done, any error or omission in describing it in the notice or record should, in the interest of justice, be corrected at any time. Besides this, several of the states, no-

tably Colorada, Montana and South Dakota, have enacted statutory provisions authorizing the making and filing for record of additional, or amended, notices of location, declaratory statements, or location certificates, as they are variously called. But, whether authorized by state statute or not, it is the right of the locator, according to the trend of judicial opinion, and correctly so, as we think, to file and record such amendments at any time. When so filed, in the absence of intervening rights, or for mere corrections, they should operate by relation to the date of the original location, for the purpose of cutting off any subsequent locations, interfering or overlapping surface boundaries, where the surface boundaries of the original location sought to be amended were themselves so marked upon the ground that they could be readily traced; it being a controlling principle of the doctrine of relation that it will operate upon equitable lines, but never to do a wrong; and it could not be considered as wrong, where, by reasonable intendment, it could be ascertained with reasonable certainty what was sought to be claimed by the original location.

There is no rule better founded in reason, law or convenience than this doctrine of relation, by which all the several parts and ceremonies necessary to complete a conveyance or establish an estate shall be taken together as one act, and operate from the substantial part by relation. But the doctrine is never applied when it would wrongfully defeat the rights of third persons; for, it is said, "relations are fictions in law which will never do wrong;" and they can never be applied to a void act.[1] So, in the matter of acquiring right to mining claims, the notice of location, being the inception of the grant from the government, all matters by way of mere amendment will relate to the first step of the transac-

[1] 20 Am. & Eng. Encyc. Law (1st ed.), pp. 726–27, citing, which see, Landes v. Brant, 10 How. (U. S.) 348; Rogers v. Brent, 10 Ill. 573; Barr v. Gratz, 4 Wheat. 213; Cavender v. Smith, 5 Iowa, 157; Menville's Case, 13 Coke, 261; Jackson v. Douglas, 5 Cow. (N. Y.) 458; Case v. De Goes, 3 Cai. (N. Y.) 261; Sampson v. Thornton, 3 Met. (Mass.) 275.

tion, where the boundaries are not sought to be changed. Of course, any attempt to change the boundaries would be of no effect if they interfere with intervening rights. But even boundaries may be changed, if that can be done so as not to interfere with or prejudice the rights of third persons.[1]

§ 426. Same subject — State statutes — When amendment will relate to original date.— Many of the states and both the mining territories have enacted statutes authorizing amendments to the location certificates in certain instances. These statutes are progressive in their nature and are possessed of the spirit of the time. It is unnecessary to reproduce their substance at this time, inasmuch as we have given them in full in the Appendix. Their purpose is apparent, and is to correct any mistake or omission which, by reason of inadvertence or a misconception of the strike of the vein, or for any other reason, crept into the original notice or location certificate. In an early case the law was thus stated by Judge Hallett: "The first record of a mining claim is usually if not always imperfect, and it is the policy of the law to give the locator an opportunity to correct his record when defects are found therein, and when so corrected the amendment takes effect with the original as of the date thereof."[2]

§ 427. Same subject — Colorado authorities discussed — General purpose and effect of amendments — Relation — Certificate — Overlapping dead claims.— In an important case in Colorado it was held that where an amendment to a

[1] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312. See also McKay v. McDougall (Mont., 1901), 64 Pac. Rep. 669; Omar v. Soper, 11 Colo. 389, 18 Pac. Rep. 443; McEvoy v. Hyman, 25 Fed. Rep. 526. See also, where it will be applied in certain cases against third persons having notice, Van Cott v. Moore, 26 Mo. 92.

[2] McEvoy v. Hyman, 25 Fed. Rep. 596; Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111. See also Faxon v. Barnard, 4 Fed. Rep. 702; McKay v. McDougall (Mont., 1901), 64 Pac. Rep. 669.

location certificate is made before adverse rights attached, the amendment related back to the original location.[1] So where one had made a location, valid in other respects, but had failed to file for record a valid certificate, an amended certificate made before defendant had acquired any intervening rights would as to him relate back to and preserve the claim as originally located and staked.[2] Likewise an additional location certificate, filed by the locator of the claim for one of the purposes mentioned in the general statutes, need not specify for what purpose it is filed.[3] It has also been held by the same court, that an additional location certificate may be filed for record and the record thereof offered in evidence after suit is brought concerning the claim with the same effect as if filed before, and it serves the same purpose as an original location certificate, if no other valid rights have intervened.[4] And where an older location has been abandoned, and a junior one overlaps, the junior locator may file an amendment as to the overlapping ground.[5] While all of these decisions were made under a special statute authorizing an additional location certificate to be filed for certain reasons or purposes, we apprehend the rule would not be essentially different if no reasons for the amendment were given, or even in the absence of local statutes or district rules authorizing them.

§ 428. Amendment or addendum to notice — Record and marking independent of statute — How far permissible.— Enough has appeared in the foregoing to demonstrate that it is the policy of the law, and intent of the law-making power, that the subject of the grant which the miner acquires by location should be described with common certainty. The general policy of law elsewhere, and apart

[1] McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 654.

[2] Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 24.

[3] Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 178.

[4] Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111.

[5] Johnson v. Young, *supra*.

from the mining law, is to encourage certainty by liberal allowance of amendments. This principle pervades the entire system of the law; and so, following these well-recognized principles, and in the absence of any statute or rule forbidding it, it is obvious that where no intervening rights will be injuriously affected, nor any locator prejudiced thereby, an amendment or *addendum* may be made to the location and record thereof; always observing the same forms and rules required for the original record.[1] Nor is there valid objection predicable upon these amendments, for the very obvious reason that a subsequent locator is not in a position to object to them, on the ground that the claim was not duly marked or recorded in time, as the case may be, provided such prior location was sufficiently marked on the ground or recorded before such subsequent locator made any location or attempted the acquisition of any rights in the premises.[2]

§ 429. Cannot affect intervening rights — Estoppel by first record.—Following the principles laid down in the preceding sections, and proceeding under the general principles of estoppel, it must be quite apparent, and it can now be said to be well settled, that where other rights have grown up, guided or controlled by the original location or record, no *addendum* or amendment can be made so as in any manner to interfere with such rights;[3] and it follows that in such case, while the amendment can be made the same as in any other, it does not relate to the date of the original location, but only from the date of making the

[1] See Gleeson v. Martin White M. Co., 13 Nev. 442; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666; Golden Terra M. Co. v. Mahler, 4 M. R. 390.

[2] Jupiter M. Co. v. Bodie Cons. M. Co., *supra*. See p. 681. See also Crown Point G. M. Co. v. Crismon (Oreg., 1901), 65 Pac. Rep. 87; *ante*, § 398.

[3] Kelly v. Taylor, 23 Cal. 1; Gleeson v. Martin White M. Co., 13 Nev. 442; Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522.

amendment, and the rights under it are accordingly circumscribed, and limited to that date.[1] An illustration of this principle was given in a late case in Arizona in a thoughtfully considered opinion by Mr. Justice Sloan, wherein the principle of liberal construction was distinctly recognized and full effect given to it. The case was one where the location notice, and the certificate as recorded, described the location by the general terms "easterly" and "westerly," and it was claimed that such loose description gave the right to swing the claim, at least within the period fixed for marking, and even to some extent thereafter, by amendment. Speaking on the question the learned justice declares the controlling principle of estoppel in the following language: "Should, however, the locator, at the time of posting his notice, in addition to giving the general course of his vein, place monuments at the center of each end line, and thus definitely give notice to subsequent locators as to the meaning and intent of the language used in his notice, as to the general course of his location, we think, under the law, he is bound by the location thus made and defined, so that he may not thereafter, and during the ninety days permitted for the perfection of his location, change the course of his location to the prejudice of intervening rights. It would be unjust to permit a locator who had thus marked out the course and direction of his location with certainty, to include subsequently, by a change in the course of his location, discoveries of mineral and parts of locations which others may have made relying upon the express representation of the prior locator as to the extent of his rights."[2]

§ 430. Uninjured subsequent locator cannot complain—Amendment as to description.— The consensus of opinion as gathered in the foregoing justifies the statement in the

[1] Pollard v. Shively, 5 Colo. 309; Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111; Preston v. Hunter, 67 Fed. Rep. 996; Zollers & H. C. M. Co. v. Evans, 5 Fed. Rep. 172; Harris v. Equator M. Co., 8 Fed. Rep. 868.

[2] Wiltsie v. King of Arizona M. & M. Co. (Ariz.), 60 Pac. Rep. 896, 898. See also *ante*, § 394, note 5, p. 362.

heading. This would seem to be such a plain and commonplace statement of an elementary principle that the citation of authority would not be necessary. But we deem it best to quote a statement of this principle made by the supreme court of Colorado. The decision was one under a statute authorizing amendments, and the facts were that the original certificate did not describe the claim with sufficient reference to a natural object or permanent monument, and the amendment was expressly made, as stated in the amendment itself, for the purpose of curing this defect. There was no dispute but that the location was properly marked on the ground; the plaintiffs in the adverse suit basing their rights solely upon an advantage sought to be taken of this defect in the notice or location certificate. The defendants had judgment, and in supporting the same the court uses this language, while it reverses the case for other reasons: "We are of opinion that the defendant was in a position, under the foregoing facts and circumstances, to invoke the rule of decision that a subsequent locator cannot object that all the steps necessary to a valid location of a mining claim were not performed at the time of its location, provided they were afterwards performed before other rights attached. This rule was applied when objections were raised that claims were not sufficiently marked upon the ground at the time of the location. . . . Likewise, in cases of failure to file location certificates within three months after discovery of claim as required by statute."[1]

§ 431. Amendment made before expiration of location period cannot be questioned.— Except under such circumstances as would work an estoppel, as shown in the preced-

[1] McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 652, citing (*q. v.*) North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 114, 11 Fed. Rep. 666; Faxon v. Barnard, 2 McCrary, 44, 4 Fed. Rep. 702. See also Crown Point Gold M. Co. v. Crismon (Oreg., 1901), 65 Pac. Rep. 87.

ing sections,[1] since the locator on posting his notice of discovery and making his discovery is allowed by the decisions of the courts and the statutes of the states a reasonable, and in some cases a certain time, in which to complete all the acts of location, if a record is made earlier than necessary, and is changed or amended within the time allowed for such completion, it necessarily follows that no intervening claimant can complain so long as the amendment is within the proper lines of the original claim.[2]

§ 432. The doctrine of this chapter restated.—It appears from the foregoing that we are justified in summarizing the law to be—

1. That the general policy of the law, independent of statute, favors amendments for the purpose of greater certainty and to avoid litigation, for it is said "the law despises litigation."

2. That wherever state statutes or district rules provide the circumstances and conditions under which amendments may be made, these are controlling.

3. That independent of statutory provisions or district rules, amendments should be recognized and given due weight and effect by the courts.

4. That amendments made in either way, whether pursuant to state statutes or independent thereof, in the absence of innocently inaugurated, conflicting and adverse rights, relate to the time of the original date of location. But—

5. Where the original notice or marks on the ground, or both, are of such a nature as to justify the conclusion reached by subsequent locators that they correctly mark

[1] See *ante*, §§ 429, 430.

[2] Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 24; Sanders v. Noble, 23 Mont. 110, 55 Pac. Rep. 1037; Marshall v. Harney Peak T. M. M. & M. Co., 1 S. Dak. 350, 47 N. W. Rep. 290; Erhardt v. Boaro, 113 U. S. 527; Lebanon M. Co. v. Cons. Reb. M. Co., 6 Colo. 371; Preston v. Hunter, 67 Fed. Rep. 996.

and describe the ground intended to be claimed, the original locator may not amend either so as to interfere or conflict with rights acquired in pursuance of such conclusion. In other words, an estoppel is created thereby.

6. In any case complaints cannot be made of amendments made to correct any discrepancy or error in a location, or in the record thereof, by one who is uninjured thereby.

PART VIII.

OF THE NATURE, QUANTITY AND EXTENT, LIKEWISE THE QUALITY OF ESTATE SECURED BY LOCATION, AND HEREIN OF ANNUAL LABOR, ABANDONMENT, FORFEITURE AND RELOCATION.

CHAPTER I.

OF THE QUALITY OF ESTATE BY LOCATION — AN ESTATE UPON CONDITION — AND HEREIN OF CERTAIN SPECIAL EASEMENTS AND SERVITUDES — LIKEWISE OF CERTAIN POSSESSORY RIGHTS, DOWER, AND MISCELLANEOUS.

§ 439. Preliminary observations — Location constitutes grant.
440. Same — The purposes of congressional legislation.
441. Mining rights early recognized by the courts.
442. Extent and nature of estate secured by location.
443. Illustrations of the rule — All veins belong to the locator.
444. The law of cross-veins as applied to this matter.
445. Some slight apparent contradiction — Rule of statutory construction — All sections to be construed together.
446. Here as to surface ground — Subsurface rights further on.
447. Possessory rights and *status*, unsatisfactory — Recognized by national and state legislation.
448. Surface lines are important and controlling under the statute — Necessity of properly laying surface lines so as to include apex.
449. Importance of correctly placing boundaries — Interdependent nature of lode and surface ground — All veins contained in ground belong to locator.
450. Rights under the statute defined — Nature, quality and extent of possessory right.
451. A location constitutes grant.

§ 452. Possession must be followed by valid location or it is not effective — The right also comes from a valid location.
453. Definition and proof of possession.
454. Same subject — Compliance with the law essential — Possession alone of no value.
455. Presumptions from actual possession form apparent exceptions to the rule.
456. Office of a presumption — Must not be mistaken for location.
457. One in possession may not remain silent — Right of possession must be asserted against intruder.
458. The perfected location before patent is an estate upon condition.
459. Similarity to Mexican and Spanish law.
460. Compared with copyhold estates at common law.
461. *Dominium utile* of the civil law.
462. Of certain easements and servitudes — Specially connected with mining claims.
463. Also subject to vested water rights.
464. Local legislatures have power to limit this easement.
465. Other implied limitations.
466. Possessory rights equal to patent so long as the law is complied with.
467. Possessory actions maintainable — Property in the highest sense of the term.
468. Estate of inheritance — May be selected as a homestead — May be sold on execution.
469. Overlapping locations.
470. No dower interest attaches in mines before patent.

§ 439. Preliminary observations — Location constitutes grant.— We now approach the consideration of the nature, character and quantity of the estate which the miner secures by compliance with the statute authorizing the location of mining claims. Prior to the enactment of the statutes, the necessities of the times impressed upon these possessory rights definitions not entirely satisfactory or conclusive under the common law, but they were such as the circumstances of the times seemed to warrant. The occupants of the public domain were, tacitly at least, the licensees of the government. Then, too, there was possibly the further question that these lands, coming to us as they did from the government of Mexico, impressed to a greater or less extent with the rights, conditions and limitations im-

posed by the Mexican law at the time of the treaty of Guadalupe-Hidalgo, both as to the legal *status* and rights of the occupant, and as to the possible extent to which he might go in the direction of acquiring some sort of an estate from the sovereign. This, as we have seen, was unsatisfactory both to the government and to the occupant. There was absolutely no means provided by law whereby a fee-simple title could be secured, or whereby the government could in any manner part with any kind of estate in the lands. They were constantly impressed with fictions foreign to the American doctrine of real property, and there was no provision or limitation as to the citizenship of the claimant or occupant of the property. The aliens, including Chinese, except where they were restricted by state laws, were admitted into, and took part in, the common scramble for the possession and right to occupy and work these mining claims.

§ 440. Same — The purposes of congressional legislation.— Legislation, therefore, viewed in the light of our subject as now presented to us, was at least twofold: First, to provide a means whereby the government, under certain limitations, might part with the right of possession and protect the mine owner in the occupancy of the mineral lands, and afterwards vest him with a fee-simple title, if he saw fit to acquire it; second, to correct the rapidly growing mischief of aliens owning and holding mineral lands, equal in right and protection with citizens. The decisions upon the subject prior to the enactment of the federal statutes are valuable as defining the *status* of a mere locator at the present time, independent of the question of the right of possession given by the statute itself.

In an early California case, after speaking of the necessity of protecting these possessions, the court said: "The owner of a mining claim has, in practical effect, a good vested title to the property, and should be so treated until his title is divested by the exercise of the higher right of the superior proprietor. His rights and remedies in the meantime are

not trammeled by the consideration that the higher right to reclaim the property exists in another, which right may possibly, but not probably, be exercised. His right to protect the property for the time being is as full and perfect as if he was tenant of a superior proprietor for years or for life."[1]

While the statute, as interpreted by the courts, as we have already had occasion to remark, was inadequate to meet the situation, it was a long step in the right direction. An early law writer thus gives a very correct view of it: "The 'tandy product' of our government in conferring permanent titles to holders of mining claims upon public lands in California, and throughout the mining region, is to be found in this law. As the initial act of the legislation which must necessarily follow, it is more commendable as an acknowledgment of the justice and necessity which dictated it, and its expediency as a means to the advancement of the material interests of the state and nation, than for the perfection of its provisions, or their exact adaptation to the accomplishment of the object intended. We must not, however, find fault with the law on account of its imperfections, or the introduction of objectionable features in the mode to be followed in acquiring a title under it. These imperfections can be remedied, the rights of the parties amplified in many particulars, and the system so changed as to work with more facility than now anticipated."[2]

§ 441. Mining rights early recognized by the courts.— The mining rights which grew up on the Pacific coast were necessarily protected by the courts as far as possible by the elastic principles of the common law. Besides which, the local rules and customs were given the force and effect of common law so far as possible in the solution and settlement of difficulties. So firmly rooted did this doctrine become that it was crystallized into the statute.[3]

[1] Merced M. Co. v. Fremont, 7 Cal. 317.

[2] Yale, Mining Claims & Water Rights, pp. 9, 10. See also Gleeson v. Martin White M. Co., 13 Nev. 442.

[3] California Practice Act of 1851, § 621; California Code Civ. Proc.,

It thus appears that, prior to the statute, possessory actions were controlled almost entirely, and since then largely, by the rules of the district. The reason of this rule is obvious. These rules were the product of miners' meeting generally; at all events, they rested upon the firm footing of common consent, and expressing, as they did, the simple sentiments of the miners themselves, were better calculated to furnish a guide for the solution of difficulties than the general principles of the common law alone, although, as every lawyer knows, the latter is an indispensable assistant in the interpretation and enforcement of any judicial system, notwithstanding Judge Sanderson affected to believe that the legal profession seemed to him to have been too long tied to "the treadmill of the common law."[1]

The value of these rules and customs is undoubted, and their bearing on the mining law of controlling importance. They are with us to stay, and have become general and practically uniform throughout the mining region. The miners made them; they have faith in them and obey them;[2] and neither the history nor the law of the times can be correctly written without assigning to them their proper place.

§ 442. Extent and nature of estate secured by location — The statute.—A location perfected as required by law gives the locator an exclusive right of possession of the surface ground and all the veins of every kind; not only the one located, but all others, including spurs, offshoots and

§ 748. See also English v. Johnson, 17 Cal. 107; Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558; Pralus v. Pacific G. & S. M. Co., 35 Cal. 30; Morton v. Solambo C. M. Co., 26 Cal. 527; Table Mountain T. Co. v. Stranahan, 20 Cal. 199, 31 Cal. 397; Bell v. Bedrock Tunnel Co., 36 Cal. 219; Coleman v. Clements, 28 Cal. 247; Roach v. Gray, 16 Cal. 383; Brown v. 49 and 50 M. Co., 15 Cal. 152-61; Fairbanks v. Woodhouse, 6 Cal. 435. Nearly all the mining states and territories have similar if not identical statutory provisions.

[1] Morton v. Solambo C. M. Co., *supra*.

[2] Morton v. Solambo C. M. Co., *supra*. See also Jennison v. Kirk, 98 U. S. 453; Jackson v. Roby, 109 U. S. 440; Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471; People v. Shearer, 30 Cal. 645.

cross-veins, the top or apex of which lies within the surface boundaries.[1] The section of the statute, so far as material to the matters discussed in this chapter, reads as follows: "The locator of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, his heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."[2]

§ 443. Illustrations of the rule — All veins belong to the locator.— The purpose of this inquiry being to ascertain and demonstrate the quantity of estate as well as surface and subsurface acquired by the locator, it is necessary, in order to escape some of the rocks and shoals which have been encountered by some courts in the interpretation of this statute, that we begin at the beginning and ascertain its real meaning. Some courts have found it necessary to believe that the section providing for cross-veins referred to those crossing upon the strike, and that it engrafted an exception upon the other sections, or, by virtue of its subsequent position in the law, repealed them altogether. We believe, and will attempt to demonstrate, that when the various sections of the statute are read together and consid-

[1] Gwillim v. Donnellan, 115 U. S. 45; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428; Walrath v. Champion M. Co., 72 Fed. Rep. 978; Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; s. c., 116 U. S. 529; In re Lewis, 1 L. D. 15; Patchen v. Keeley, 19 Nev. 404; Blake v. Butte S. M. Co., 2 Utah, 54; Copper Globe M. Co. v. Allman (Utah), 64 Pac. Rep. 1019; Seymour v. Fisher, 16 Colo. 188, 27 Pac. Rep. 240; Wilhelm v. Sylvester, 101 Cal. 358.

[2] Act of May 10, 1872, 17 Stat. at L., p. 91, § 8; R. S. U. S., § 2322.

ered, "taken by their four corners and construed," there is no serious conflict, and all will safely stand together and form a not inharmonious whole. This conclusion becomes more apparent and of greater force if we shall select as a premise that provision of the statute quoted in the last preceding section and cluster the other sections about it and make them depend upon it. As was said by Mr. Justice Kibbey of Arizona in a carefully considered case: "Section 2322 gives not the lode alone, but all lodes, veins and ledges . . . the top or apex of which lies inside of the surface lines of the claim extended downward vertically. . . . In other words, congress has said to the miner, 'comply with the requirements that we impose and the government of the United States will grant absolutely to you a piece of the earth bounded at the surface by straight lines, distinctly marked, and by planes extending through those lines to the center of the earth; and you shall have all lodes of mineral-bearing rock whose apex is within those boundaries.' This is simple, plain, and the miners' rights are thereunder easy of ascertainment. He does not have to trouble with dips, spurs and angles. If he or another makes distinct discoveries of one lode, or of a dozen different lodes, which have their apex within his boundaries, he is not concerned about their identity. No one can question his right to them. They are all within his slice of the earth, and by the express terms of the statute they are his."[1]

Chief Justice Zane, speaking for the supreme court of Utah, uses this language: "This section gives the exclusive right of possession and enjoyment of the surface of a claim, and to all veins the apexes of which are found within planes extended downwards vertically through the surface lines. Does this language mean that the apex must be entirely within those lines, or that it must not be entirely without? When the apex lies partly within and partly without, was

[1] Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418; *post*, §§ 907, 911.

it the intention to segregate the vein, or, so to speak, to split it laterally?"[1]

§ 444. The law of cross-veins as applied to this matter. As intimated in the last preceding section, a correct understanding of section 2322 involves the consideration of the section relative to cross-veins. This statute provides that in case of veins crossing each other the older claim shall own the space of intersection, and the junior claim the right of way through the same; and while the consideration of the subsurface aspects must be postponed to the time when we shall consider the right of the locator upon the dip of his vein, it is proper to say at this time that, as we view the law, congress had in mind the case of veins crossing each other upon the dip, and not of veins crossing upon the strike, as some of the courts have led themselves to believe. This construction gives practical effect to every letter and word of the statute, while any other construction, that is to say, the construction placed upon it by some courts, involves a departure from the plainest principles of statutory construction, namely, that all the provisions of a statute shall be considered together, which principle has evidently been overlooked by one court,[2] following the ill-considered dictum of another,[3] and as a result the earlier decisions have created some confusion.[4] But the later ones are in harmony with the plain reading of the statute, to the effect that the surface proprietor owns all veins apexing in his ground.[5] The last expression of the courts found under our observation upon this subject is by the supreme court of Colorado, holding that the rule *stare decisis* is not strong enough to per-

[1] Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3.

[2] Branagan v. Dulaney, 8 Colo. 408, 8 Pac. Rep. 669; Morganson v. Middlesex M. Co., 11 Colo. 176, 17 Pac. Rep. 513; Lee v. Stahl, 9 Colo. 208, 11 Pac. Rep. 77; s. c., 13 Colo. 174, 22 Pac. Rep. 346.

[3] Hall v. Equator M. & S. Co., 11 Fed. Cas. 222.

[4] *Post*, Part XI, ch. VII, §§ 906–911.

[5] See next succeeding section. See also Calhoun G. M. Co. v. Ajax G. M. Co. (Colo. Sup. Ct.), 59 Pac. Rep. 607.

petrate a wrong, and in overruling the reasoning and decisions of that court in the earlier cases it proceeds to say: "By section 2322, *supra*, it is expressly provided that from and after the passage of the act of which it forms a part, the locators of all mining claims theretofore or subsequently made, to which no adverse rights had attached on the 10th day of May, 1872, upon compliance with the laws and regulations governing their title, shall have the exclusive right of possession and enjoyment of the surface included within the lines of such locations, and of all veins throughout their entire depth apexing inside of such surface lines extended downward vertically, although such veins might so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines. This section, standing alone, would seem to be clear, explicit and unambiguous. It provides a test by which the right of a locator to a vein inside of the lines of his location, extended downward vertically, should be determined, namely, if the top or apex of a lode was within the boundaries of his claim, as above designated, then he should be the exclusive owner thereof; provided, of course, that no adverse rights thereto existed at the date of his location. . . ."[1]

§ 445. Some slight apparent contradiction — Rule of statutory construction — All sections to be construed together.— Much of the matter connected with this branch of our subject must necessarily be postponed to that part of our work in which extra-lateral rights are considered. The exact relationship of spurs and offshoots, as well as transverse veins to the main vein located, has not been fully and harmoniously settled, some courts inclining to the rule that the line marked on the ground and called an "end line" is by estoppel a vertical plane,[2] while by *dictum*, in many

[1] Calhoun G. M. Co. v. Ajax G. M. Co. (Colo.), 59 Pac. Rep. 607. See also Argonaut G. M. Co. v. Turner, 23 Colo. 400, 48 Pac. Rep. 685.

[2] Cosmopolitan M. Co. v. Foote, 101 Fed. Rep. 518.

cases, and by express decision in one case,[1] the doctrine is announced that, where side lines become end lines, end lines also become side lines for all purposes, including the right to pursue the vein on its downward course beyond those lines. We incline to the latter view, but will postpone our reasons therefor to the consideration of the subject of extra-lateral rights.[2] The rule is also firmly rooted that the lines on the surface established for the main vein are the lines for all veins.

Respecting the principle of statutory construction involved in the matter in hand, and the relationship of section 2322 to the other sections of the statute as to cross-veins, notably section 2336, it is proper to say that in the leading case considered in the last section the reasoning of the court, profound in itself, and being a clear statement of the most approved rules of statutory construction, is here reproduced. After considering the two leading cases in Colorado,[3] the court proceeds to say: "The rule adopted by the court in construing it (the statute) in that case[4] is an arbitrary one, and never resorted to except in cases where the different sections of an act are in conflict, namely, as between conflicting sections in the same statute, the last in order of arrangement will control, and, applying this doctrine, reached the conclusion that under section 2322 the locator of a claim acquired no rights to cross-veins apexing within the limits of his location. The rule above announced is only applicable when there is an irreconcilable conflict between the different sections of the same act, and no reasonable construction will harmonize the parts; but, as the two sections under consideration do not conflict in all their terms, the real question presented in construing them is, does the latter qualify the former? It is presumed that each section is intended to co-act with every

[1] Empire M. & M. Co. v. Tombstone M. & M. Co., 100 Fed. Rep. 910.

[2] See *post*, Part XI, ch. VII.

[3] Branagan v. Dulaney, 8 Colo. 408; Hall v. Equator M. & S. Co., Fed. Cas. No. 5,931.

[4] Hall v. Equator M. & S. Co., *supra*.

other of the act of which it is a part, and that no one is intended to antagonize the general purpose of the enactment.[1] It is also a rule that, in order to ascertain the legislative intent, every section of the act is to be construed; that it is to be construed as a whole;[2] and that construction which renders the whole act harmonious, and gives effect to every clause and part, is to be favored.[3] . . . The words employed in a statute are to be construed with reference to the subject-matter and the object sought to be attained,[4] . . . and its language should receive that construction which will render it harmonious with that purpose rather than defeat it."[5]

§ 446. Here as to surface ground — Subsurface rights further on.— As previously intimated, we are concerned in this branch of our inquiry with the rights acquired by the miner to the surface ground merely, so far as we may treat that question separate from that of subsurface rights. An orderly and philosophical examination of the subject, when correctly understood, necessarily segregates the discussion of surface rights which are exclusive,[6] from those attaching to the lode or vein, which impress a new condition or limitation upon the common-law estate and ownership of land.[7] It must be remembered that the common-law right to real property was circumscribed by vertical boundaries, and that rule pervades the mining law everywhere outside the western part of the United States, with a slight modification in the early German law, the Derbyshire High Peak customs,

[1] Citing Suth. Stat. Const., § 160.

[2] Id.; Parkinson v. State, 74 Am. Dec. 522.

[3] Citing 23 Am. & Eng. Encyc. Law (1st ed.), 309; Brooks v. Com'rs, 31 Ala. 227; People v. Burns, 5 Mich. 144; Patterson v. Spearman, 37 Iowa, 36.

[4] Citing 23 Am. & Eng. Encyc. Law (1st ed.), 322; Brewer's Lessee v. Blougher, 14 Pet. 178; Sedgw. St. Const., 359.

[5] Calhoun G. M. Co. v. Ajax G. M. Co. (Colo. Sup. Ct.), 59 Pac. Rep. 607, 613; affirmed, s. c., 182 U. S. 499, 45 L. ed. 1200, citing also Taylor v. Broad, 67 Ind. 383; People v. Lacombe, 99 N. Y. 43, 1 N. E. Rep. 599.

[6] For a full discussion of subsurface rights see *post*, Part XI.

[7] Id., ch. VII.

and the extended mining locations in Mexico. In reviewing the early Mexican law, Mr. Justice Bradley in an early case stated the idea, which became to some extent the parent of our law, in the following words: "The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular."[1] Under the law prior to the statute of 1872, both as recognized by the miners' rules and as enacted into the statute of 1866, the lode was the principal thing located and the surface ground a mere incident.[2] But it was not intended thereby that two separate estates should be granted in all respects; rather it was that the lode and surface ground were granted[3] with the incidental easement and right of pursuing the vein on its downward course. This latter is still the law.

§ 447. Possessory rights and status unsatisfactory — Recognized by national and state legislation.— The doctrine prevailing on the Pacific coast prior to the statute, and that expressly recognized by the statute, was an enunciation of new and startling principles ingrafting themselves upon the common-law estate, or, perhaps, more accurately, the severance of that estate. By the common law, of course, and this is and was the learning of all lawyers, he who owned the surface owned all above and beneath it.[4] And

[1] Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463, citing Rockw. Mines, pp. 56, 58, 274, 275.

[2] Johnson v. Parks, 10 Cal. 447; Patterson v. Hitchcock, 3 Colo. 533; Wolfley v. Lebanon M. Co., 4 Colo. 112; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819; Walrath v. Champion M. Co., 68 Fed. Rep. 562; Atkins v. Hendree, 1 Idaho, 95, 2 M. R. 328; Blake v. Butte S. M. Co., 2 Utah, 54, 57.

[3] McCornick v. Varnes, 2 Utah, 355; Wolfley v. Lebanon M. Co., *supra*.

[4] 2 Black. Comm. 18; Broom's Leg. Max. (7th ed.), 395, 397; Co. Litt. 4*a*;

of course prior to the statute, the owner of a mining claim had no other rights than surface rights upon which he could maintain an action. True, he claimed the right, and it was generally recognized, to his vein with all its dips, spurs and angles, but, even in their zeal and willingness to protect possessions thus held by the miners, the reported cases will be searched in vain for any judicial statement prior to the statute wherein the right to follow a vein on its downward course was recognized. Surface possessions were recognized, the occupants being considered at least to some extent the licensees of both governments, state and federal. This possessory right, in which the first in time was strongest in right, was not interfered with, but was recognized by the national legislature long before the passage of the mining law by statute, which reads as follows: "No possessory action between persons in any court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; each case shall be adjudged by the law of possession."[1]

These possessory rights, it will thus be noticed, were recognized by national legislation; they were also recognized by courts, before the passage of the above statute, as sufficient upon which to base and maintain possessory actions.[2] They were inadequate, however, to meet the necessities of the situation. An example of the recognition of these conditions is found in the following language of the supreme court of the United States: "In the act organizing the territory of Nevada there is no clause annulling grants or claims to lands, while large legislative powers are conferred by the territorial legislature, limited only,

Reynolds v. Clark, 2 Ld. Raym. 1339; Fay v. Prentice, 1 C. B. 828; Bullion M. Co. v. Croesus M. Co., 2 Nev. 168.

[1] Act of February 27, 1865, 13 Stat. at L., p. 441, § 9; R. S. U. S., § 910.

[2] Bogge v. Merced M. Co., 14 Cal. 378; People v. Morrow, 26 Cal. 336; English v. Johnson, 17 Cal. 107; King v. Edwards, 1 Mont. 233; Broder v. Natoma Water Co., 101 U. S. 274; Harris v. Equator M. & S. Co., 8 Fed. Rep. 863.

as to lands, by the prohibition of interference with the primary disposal of the soil by the United States, and of unequal taxation in certain cases. We know also that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. . . . And we cannot shut our eyes to the public history which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country."[1]

§ 448. Surface lines are important and controlling under the statute — Necessity of properly laying surface lines so as to include apex.— It is thus shown that possession was recognized and protected by statute, rule and decision prior to the enactment of the federal mining law; but the possession thus recognized by the local mining rule, as measured by the dimensions of the claim, was that of the placer claimant, the rights of the lode claimant being measured by his possession as shown by his mining works. Under the statute, however, it became necessary to mark out the boundaries on the surface so that the same could readily be traced, and so that the right of possession would attach to a definite and known area. It will thus be seen that the statute does not restrict, but extends, and to some extent reverses, previous conditions, thus making surface lines the measure of subsurface rights.[2] The controlling importance of surface lines is thus demonstrated, as by them all rights are determined. The decisions of the supreme court of the

[1] Sparrow v. Strong, 3 Wall. 97, 18 L. ed. 49. See also Gold Hill Q. M. Co. v. Ish, 5 Oreg. 104; Conger v. Weaver, 6 Cal. 548; Smith v. Doe, 15 Cal. 100; Gottschalk v. Meising, 2 Nev. 185.

[2] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Flagstaff M. Co. v. Tarbet, 98 U. S. 258; King v. Amy & Silversmith Cons. M. Co., 152 U. S. 222; Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, L. ed. Book 43, p. 72, affirming s. c., 66 Fed. Rep. 212.

United States, some of the leading of which are mentioned in the last preceding note, are uniform in recognizing surface boundaries as controlling. While the lode and the surface go together, the surface lines measure the right.

That the miner sometimes fails, through hasty or improper marking, in obtaining all he seeks is not the fault of the law, but rather his own. If he finds the surface so covered with brush, vegetation, trees or debris as to make it difficult or impossible to trace the strike of the vein so as to cover it with his surface lines, and for that reason marks it out "by guess," he must abide the result. The courts say, with very little force or justice it must be admitted, since, usually, local rules or statutes require marking within a specified time, that the remedy must be found, until the law is changed, in carefully marking the boundaries or postponing such marking until by exploration the true strike can be determined.[1] If the claim is worth locating it is worth locating correctly, and the miner who is content with a superficial or no examination, when a more careful one will properly guide him, should not complain of the law for his own mistakes or negligence. He must make careful examination and mark accordingly, for he must abide the result in any event.

§ 449. Importance of correctly placing boundaries — Interdependent nature of lode and surface ground — All veins contained in ground belong to locator. — The importance of correctly placing surface boundaries cannot be overestimated. In the preceding section and other parts of this work,[2] we have attempted to demonstrate this. It is thus that the interdependent nature of the lode and surface ground is shown. The right to the surface ground depends upon the existence of the lode and its continuation longitudinally.[3] Thus it has been held that if a located

[1] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196.

[2] See *ante*, §§ 384, 385, 389.

[3] Patterson v. Hitchcock, 3 Colo. 533; King v. Amy & Silversmith M. Co., 9 Mont. 543, 24 Pac. Rep.

lode terminates at any point within the location, or departs at any time from the side lines thereof, the location beyond such point, and to that extent, is defeasible, if not void, as to a patent,[1] but unquestionably the right to pursue the vein on its dip depends upon the correct placing of surface lines so as to include the outside parts sought to be mined.[2] The observation that any part of a correctly located claim could become defeasible because of the departure from the side line of the vein located was hastily and inconsiderately made, since within the lines of his location the locator has not only the vein located, but all others apexing within the vertical planes of his surface lines.[3]

§ 450. Rights under the statute defined — Nature, quality and extent of possessory right.— It may be said to be settled that compliance with the mining laws of congress and the local customs of the state or district invests the proprietor with an estate which is, for the time being at least, and until divested by the happening of some one of the events working a divestiture, property in the highest sense of the term, and to all intents and purposes an estate of inheritance, which is as complete and full as if it were a fee-simple estate. As was said by Chief Justice Axtell: "A location of a mining claim when perfected has the effect of a grant from the United States of the right to present and exclusive possession and enjoyment of all the surface included within the lines of the location."[4] Following the same principle, Mr. Chief Justice Wade, of Montana, speaking for that court in an important case, uses this language: "A valid location of a quartz mining claim on the public mining lands of the United States is a grant from

200; Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284, 4 C. C. A. 329; Terrible M. Co. v. Argentine M. Co., 89 Fed. Rep. 583.

[1] Patterson v. Hitchcock, *ante*, p. 419, note 8; Terrible M. Co. v. Argentine M. Co., 89 Fed. Rep. 583.

[2] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Doe v. Sanger, 83 Cal. 203, 23 Pac. Rep. 365.

[3] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55.

[4] Baxter Mt. M. Co. v. Patterson, 8 N. Mex. 179, 3 Pac. Rep. 741, 745.

the government to the locator thereof, and carries with it, by compliance with the law, . . . a full and complete title; that, after such a location, the lands included within its boundaries are withdrawn from sale and pre-emption; that the patent relates back to the location when issued, and is the consummation of the grant which by the location had its inception; that a valid location kept alive by representation and a compliance with law gives to the locator, or his grantees, the right to the exclusive possession and enjoyment of the surface of the claim located."[1]

There are many other decisions holding in effect, and in express language, that a perfect location, held by a compliance with the further provisions of the law, implies a grant from the government having its date on the day when the first step was taken by the locator to make his location.[2] It is property in the highest sense of the word, which may be bought, sold, conveyed, and will pass by descent.[3] It was said: "A mining claim on the public domain is real property, and the subject of ownership as a claim, and that the locator thereof or his successor in interest, having fully complied with the terms prescribed by congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes. He is the owner before, as well as after, the issuance of the government patent, and is entitled to exclusive possession and enjoyment against every one, including the United States itself."[4]

On the same principle Hallett, D. J., uses this language: "In general we apply to mines in the public lands the rules applicable to real property; as that it may be conveyed by

[1] Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858.

[2] Talbott v. King, 6 Mont. 76, 9 Pac. Rep. 484; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. Rep. 576; Robertson v. Smith, 1 Mont. 410; Seymour v. Fisher, 16 Colo. 188, 27 Pac. Rep. 240; Piru Oil Co., 16 L. D. 117; Branagan v. Dulaney, 2 L. D. 744.

[3] Forbes v. Gracey, 94 U. S. 767; Belk v. Meagher, 3 Mont. 65.

[4] McFeters v. Pierson, 15 Colo. 801, 24 Pac. Rep. 1076.

deed, is subject to sale on execution as land, descends to the heir of the claimant and not the personal representative of his estate, and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property."[1]

In the supreme court of the United States is found perhaps the last expression on the subject. Mr. Chief Justice Fuller, speaking for the court, says: "When such qualified persons have made discovery of mineral lands and complied with the law, they have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited without infringing the title of the United States, and that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. . . ."[2]

§ 451. A location constitutes grant.— The observations and quotations in the preceding section demonstrate that a valid location and compliance with the law partakes of all the nature and effect of a grant from the government of the ground located.[3] It is a vested right, but only results from a lawful taking and appropriation in accordance with the law and local rules.[4] The statute not only recognizes existing conditions, possessory rights and the customs by which they were held, but it has enlarged and perfected those rights

[1] Harris v. Equator M. & S. Co., 8 Fed. Rep. 863. See also Atwood v Fricot, 17 Cal. 38; Hess v. Winder, 30 id. 349; Hughes v. Devlin, 23 id. 501; Merritt v. Judd, 14 id. 59.

[2] Manuel v. Wolf, 152 U. S. 505, 38 L. ed. 532. See also Noyes v. Mantle, 127 U. S. 348, 32 L. ed. 168.

[3] Gwillim v. Donnellan, 115 U. S. 45; Wills v. Blain, 4 N. M. 378, 20 Pac. Rep. 795; Renshaw v. Switzer, 6 Mont. 464, 13 Pac. Rep. 127; Garfield M. & M. Co. v. Hammer, 6 Mont. 83; Belk v. Meagher, 104 U. S. 769; Sullivan v. Iron Silver M. Co., 143 U. S. 431; State ex rel. Baker v. Second Dist. Court (Mont.), 61 Pac. Rep. 882.

[4] McGarrity v. Byington, 12 Cal. 426; Copper Globe M. Co. v. Allman (Utah), 64 Pac. Rep. 1019; Sissons v. Sommers, 24 Nev. 379, 55 Pac. Rep. 829.

to an exclusive ownership within defined boundaries.[1] While the ultimate fee is in the United States, yet the locator has, so long as he complies with the law, all the elements and characteristics of a fee-simple title, upon the single condition that he comply with the law.

§ 452. Possession must be followed by valid location, or it is not effective — The right also comes from a valid location.— The right of possession comes from a valid location, and may only be held by compliance with the rules and regulations of the district in which the claim is situated, and with state and national law.[2] From which the deduction is necessarily made that the right of occupancy may be acquired by a valid location and compliance with the mining laws, or by patent from the United States.[3] Location does not necessarily follow from possession, but the right of possession from a valid location;[4] and one claiming a mining claim beyond a *possessio pedis* must show a constructive possession, which must result either from a complete compliance with the law governing the location of a mining claim, the local customs of the district, or by physical works or marks upon the ground, or monuments, or by all of these together.[5]

§ 453. Definition and proof of possession.— By actual possession is meant a subjection to the dominion and will of the claimant, and is usually evidenced by occupation or by appropriate use, according to the particular locality of the

[1] Seymour v. Fisher, 27 Pac. Rep. 240, 16 Colo. 188; Gwillim v. Donnellan, *infra*.

[2] Hopkins v. Noyes, 4 Mont. 550, 2 Pac. Rep. 280; McKinstry v. Clark, 4 Mont. 370, 1 Pac. Rep. 759; Noyes v. Black, 4 Mont. 527, 2 Pac. Rep. 769; Hammond v. Foster, 4 Mont. 421; Sweet v. Webber, 7 Colo. 443; Copper Globe M. Co. v. Allman (Utah), 64 Pac. Rep. 719.

[3] Gwillim v. Donnellan, 115 U. S. 45.

[4] Belk v. Meagher, 104 U. S. 279; Garfield M. & M. Co. v. Hammer, 6 Mont. 58, 8 Pac. Rep. 158.

[5] Roberts v. Wilson, 1 Utah, 293; English v. Johnson, 17 Cal. 115; Hess v. Winder, 30 Cal. 355; Becker v. Pugh, 9 Colo. 589.

property.[1] It has been held that the mere evidence of staking boundaries is not proof of possession, but rather evidence of the extent of possession, and in the absence of the transcript the appellate court will presume that sufficient evidence of possession was given.[2] So far so good; but it may be laid down as a general rule, applicable alike to mining under the statute upon the public domain, or in the coal regions of the older states or of the old country, that no acts are required as evidence of possession of a mine or mining claim other than those usually exercised by the owners of such claim; nor is more or different proof required than in any ordinary case of real property. A miner is not necessarily expected to reside on his claim, nor build on it, nor cultivate it, nor inclose it. He may be in possession by himself or by his agents.[3] And the possession of a surface owner has been held to extend to the mine underneath the surface, after severance.[4] Likewise, the possession of one seam may be considered as evidence of possession of an overlying seam,[5] and may be proved by admissions.[6]

§ 454. Same subject — Compliance with the law essential — Possession alone of no value. — Mere possession alone can inaugurate no right beyond that of sacredness of person; so mere naked possession without location or boundaries marked, indicating an intention to claim a mining location, is generally of no value, and compliance with the law is essential.[7] But it has already appeared herein that one in

[1] Coryell v. Cain, 16 Cal. 567.

[2] Boardman v. Thompson, 3 Mont. 387.

[3] English v. Johnson, 17 Cal. 107; Patterson v. Keystone M. Co., 22 Cal. 577; Table Mt. Tunnel Co. v. Stranahan, 20 Cal. 199, 31 id. 387; Hugunin v. McCunniff, 2 Colo. 367; Chamberlain v. Collinson, 45 Iowa, 429; West v. Lanier, 9 Humph. (Tenn.) 762; Bracken v. Preston, 1 Pin. 584; Rogers v. Cooney, 7 Nev. 213.

[4] Stratton v. Lyons, 53 Vt. 641; Keyes v. Powell, 2 El. & Bl. 132.

[5] Turner v. Reynolds, 23 Pa. St. 199; Crouch v. Puryear, 1 Rand. (Va.) 258.

[6] Wilde v. Holt, 9 M. & W. 672; Green v. Ophir M. Co., 45 Cal. 522.

[7] Gwillim v. Donnellan, 115 U. S. 45; Chapman v. Toy Long, 4 Sawy.

the actual possession, actually and in good faith seeking to make a location, has a reasonable or statutory time in which to make and perfect the location,[1] and if he is seasonably pursuing his rights he will be protected in his possession for that purpose. This doctrine was clearly illustrated by the supreme court of Montana in the following language: "Possession within a mining district to be protected, or to give vitality to a title, must be in pursuance of the law and the local rules and regulations. . It must stand upon the law and be the result of a compliance therewith. . . . Possession without a location carries no title. Possession under a location that has become dead by reason of non-representation, or a failure to comply with the local rules and customs, is equivalent to possession with no location at all. . . . Possessory titles . . . must be supported by proof, a compliance with the law that gives the right to and sustains the possession. The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location, made in pursuance of the law, and kept alive by a compliance therewith."[2]

§ 455. Presumptions from actual possession form apparent exceptions to the rule.— To the foregoing rule, as to the requisites of compliance with the law, there are seeming exceptions. We say seeming, because they are only *prima facie* exceptions, since they flow from the doctrine of rebuttable presumption, which is only *prima facie* evidence in itself. From this principle flows the doctrine, long recognized, that one in possession of real property, including a mining claim, is presumed to be rightfully so,[3] and

28, Fed. Cas. No. 2,610; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. Rep. 197; Manning v. Strehlow, 11 Colo. 451, 18 Pac. Rep. 625; McKinstry v. Clark, 4 Mont. 370, 1 Pac. Rep. 759; Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; Mallett v. Uncle Sam M. Co., id. 188; Gleeson v. Martin White M. Co., 13 Nev. 442.

[1] See *ante*, §§ 275, 392.

[2] Hopkins v. Noyes, 4 Mont. 550, 2 Pac. Rep. 280.

[3] Campbell v. Rankin, 99 U. S. 261; Harris v. Equator M. & S. Co.,

one having no higher right, a mere trespasser, may not intrude on such possession, and by force or other wrongful act inaugurate a location.[1] The rule of the common law remains, that possession is presumed to be rightful; and even though a rightful entry is made, it must not be made with strong hand, which is wrongful; that is to say, it must not be made under such circumstances as would constitute a wrongful entry at common law.[2]

§ 456. Office of a presumption — Must not be mistaken for location.— The presumption of right which the law indulges must never be taken for a fact, but rather as evidence of a fact, or, still better, that no proof to the contrary has been shown. Men are presumed to do right and to obey the law because it is said most men do that. In the matter in hand it makes out a *prima facie* case until better evidence to the contrary is shown. As was said by the supreme court of California: "It may be and undoubtedly is a very convenient rule, in determining controversies between parties on the public lands, where neither can have absolute rights, to presume a grant from the government of mines to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor. Presumptions are indulged to supply the absence of facts, but never against ascertained and established facts."[3] And pos-

8 Fed. Rep. 863; Garthe v. Hart, 73 Cal. 541, 15 Pac. Rep. 93; Coryell v. Cain, 16 Cal. 567; Sears v. Taylor, 4 Colo. 38; Millsap v. Rocks, 2 Colo. 137; Robertson v. Smith, 1 Mont. 410; Sankey v. Noyes, 1 Nev. 63; Stainінger v. Andrews, 4 Nev. 59; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[1] Crossman v. Pendery, 2 McCrary, 189, 4 M. R. 431; Haws v. Victoria Copper M. Co., 160 U. S. 303; Hamilton v. Southern Nevada M. Co., 33 Fed. Rep. 562; Gregory v. Pershbaker, 73 Cal. 109; Newbaumer v. Woodman, 89 Cal. 310, 26 Pac. Rep. 900; Dodge v. Yates, 76 Cal. 254, 18 Pac. Rep. 338; Hawxhurst v. Lander, 28 Cal. 381; Wakeman v. Norton, 24 Colo. 192, 49 Pac. Rep. 283; Weise v. Barker, 7 Colo, 178; Rose v. Richmond M. Co., 17 Nev. 25.

[2] Horswell v. Ruiz, 67 Cal. 111, 7 Pac. Rep. 197; English v. Johnson, 17 Cal. 107; Lentz v. Victor, 17 Cal. 271; Crossman v. Pendery, *supra*; Hawxhurst v. Lander, *supra*.

[3] Biddle Boggs v. Merced M. Co., 14 Cal. 279, 375.

session, and the presumption arising therefrom, must never be mistaken for a location. It does not supply the place of that or protect one against a location peaceably made.[1] Neither can there be color of title in a mere naked possession.[2]

§ 457. One in possession may not remain silent—Right of possession must be asserted against intruder.—But the possessor of a mining claim, if he desires to stand upon such rights as he has, may not remain silent, and if he permits an intrusion upon his possession, and a location following that to be peaceably made, he cannot complain.[3] The prospector's rights were accurately defined by the late Justice Miller in an early case, wherein he reasoned out the miners' rights and duties with characteristic force. Succinctly stated, they are that the prospector upon the public domain may protect his actual possession against all the world while he is actually searching for and endeavoring to develop mineral for the purpose of making a location. But if he permits others to peaceably invade his possession and to make and establish a valid discovery and location, and such discovery is prior to any made by the one in possession, he cannot by his mere possession prevail against one fully and peaceably complying with the law.[4] Substantially the same doctrine was laid down by the trial court and upheld by the supreme court of California.[5] This, then, is the rule: A man has the right of possession to make a location on the public mineral lands if he is seasonably and in compliance with local rules or statutes pursuing his rights; but he must be in good faith doing so, and must assert such

[1] Garfield M. Co. v. Hammer, 6 Mont. 53, 8 Pac. Rep. 158; affirmed, s. c., 130 U. S. 291; Belk v. Meagher, 104 U. S. 279.

[2] Deffeback v. Hawke, 115 U. S. 391.

[3] Erhardt v. Boaro, 113 U. S. 527; Copper Globe M. Co. v. Allman (Utah), 64 Pac. Rep. 1019. See also Wilson v. Triumph M. Co., 19 Utah, 66, 56 Pac. Rep. 300.

[4] Crossman v. Pendery, 8 Fed. Rep. 693. See also Erhardt v. Boaro, *supra*.

[5] Horswell v. Ruiz, 67 Cal. 111, 7 Pac. Rep. 197.

rights against any attempted invasion, for it is not intended from the foregoing that one may invade another's possession without his consent; it is only when he does it peaceably that he may do it at all. Otherwise than that, he cannot enter the possession of another for the purpose of obtaining title or color of right; he must have it before he enters.[1]

§ 458. The perfected location before patent is an estate upon condition.—It will thus be seen, by an intelligent examination of all the authorities, and a grouping together of the principles involved, that the right to a mining claim comes from a valid location, and the right to hold it exists by virtue of the law requiring annual labor.[2] Being a right which may be enlarged or defeated by the happening or not happening of some contingent event, it possesses all the attributes of an estate upon condition.[3] As was said by the supreme court of South Dakota: "It will thus be seen that the estate of the locator or owner of a mining claim, before a patent is issued, is a conditional estate, subject to be defeated by a failure to perform the required annual work upon the claim, and that any qualified person may take advantage of the failure to perform the condition and relocate the same."[4] The condition is thus shown to be the requirement that the annual labor be performed; but for this condition the estate acquired by location would be perfect and indefeasible; but, as said by Mr. Washburn: "A condition, however, defeats the estate to which it is annexed, only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and, until this is done, it loses none of its original qualities or incidents. And any one who is interested in a condition, or in the estate to which it is at-

[1] Phœnix M. & M. Co. v. Lawrence, 55 Cal. 143, 147.

[2] Elder v. Horseshoe M. Co., 9 S. Dak. 336, 70 N. W. Rep. 1060; Jackson v. Roby, 109 U. S. 440; O'Reilly v. Campbell, 116 U. S. 418; Jennison v. Kirk, 98 U. S. 453; DuPrat v. James, 65 Cal. 555, 4 Pac. Rep. 562.

[3] 2 Washb. R. P., p. 7 (p. 447); Co. Litt. 201; 2 Bl. Com., ch. 10, p. 151.

[4] Elder v. Horseshoe M. Co., *supra*.

tached, may perform it; and when it has once been performed, it is thenceforth gone forever."[1]

It is clear that this principle of the law is peculiarly applicable to the estate of a miner, after a valid location and before patent. He must, as we shall see further on, perform the condition of annual labor. If he does not, a coowner who is interested in the estate may perform it, and this right attaches to any one directly and immediately connected with the estate; such as mortgagees, trustees, administrators, guardians, and the like.

§ 459. Similarity to Mexican and Spanish law.— This idea of imposing the condition of annual labor was not new to the statute. In the laws laid down by the district rules was the requirement of representation work. Likewise, in the Cornish and Devonshire customs, and in the customs of the High Peak of Derbyshire, certain work had to be done in each given period or the mine was forfeited. So, under the Mexican and Spanish law, the person who registered a mine never secured a fee-simple title; he simply secured a right to mine, according to the customs and laws, so long as he complied therewith.[2]

§ 460. Compared with copyhold estates at common law.— While there is no such thing as a copyhold estate in America,[3] there is a remarkable similarity in many respects between the estate held by a miner to an unpatented mining claim and that of the copyholder at common law. Both rest upon a custom; both are transferable at will; in both cases the beneficial interest is in the possessor, and the paramount title in possession of the superior proprietor. This doctrine is thus correctly illustrated by the circuit court of appeals of the ninth circuit: "The interest of the locator of a mining claim is in some respects not unlike that of

[1] 2 Washb., p. 13.

[2] Laws New Recop., ch. 5, § 2; 3 Rockw. Sp. and Mex. Law, ch. 17, p. 318, § 21.

[3] Am. & Eng. Encyc. Law (2d ed.), vol. 7, p. 507.

a copyholder at common law. Both had their origin in local custom, and in each the custom crystallized into law. The copyholder held his land by the custom of the manor, and, while the fee remained in the lord, the right to the possession and enjoyment of the premises was in him. He might alien his lands at will, and on his death they descended to his heirs. His estate might be taken in execution for the payment of his debts, and, if he became bankrupt, it passed to his trustee. But, unlike the locator of a mining claim, the copyholder held upon no condition. He did not have to comply with the rules and regulations established by the law of the manor, nor could the conditions under which he held be changed at the will of the lord. He was not required to perform labor or make improvements upon the land annually, or at all. The copyholder was practically a freeholder, and yet, because the fee was in the lord, the common law, which favored dower, denied it to the widow."[1]

§ 461. Dominium utile of the civil law.— There is likewise a resemblance between the estate of a miner in an unpatented mining claim and the relation characterized by the *dominium utile* under the civil law, where the beneficial interest only remains in the possessor.[2] This right is thus described by a leading author: "*Dominium utile* is a right which the vassal hath in the land, or some immovable thing of his lord, to use the same and take the profit thereof, hereditarily or *in perpetuum*."[3]

§ 462. Of certain easements and servitudes specially connected with mining claims.— Independent of the servitude which each owner of a mining claim owes to an adjoining proprietor who is pursuing his vein on the dip,

[1] Black v. Elkhorn M. Co., 52 Fed. Rep. 859, 3 C. C. A. 312; s. c., affirmed on appeal, 163 U. S. 433. See also 1 Scrib. Dower, p. 363; Duncan v. Nevassa Phosphate Co., 187 U. S. 647.

[2] 1 Spence's Eq. Juris., pp. 31, 33; Lindl. Mines, § 541.

[3] Spence's Eq. Juris., *supra*.

congress has impressed each location with additional easements, including drainage and other necessary means of development. The statute imposing this easement[1] reads as follows: "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage and other necessary means to their complete development; and those conditions shall be fully expressed in the patent." Some courts, in construing this section, have held that it does not impose any limitation upon the estate granted which would be enforceable in violation of a constitutional provision upon the subject of eminent domain.[2]

§ 463. Also subject to vested water rights.— The statute[3] has expressly conferred the right of possession and use and the right of way over other property for ditches and canals to all parties who by priority of possession and rights to the use of water for mining, agricultural and manufacturing purposes, have secured vested and accrued water rights therein. Whence it follows that estates in mining claims are subject to rights thus acquired, and the grantee in a patent takes subject to the easement reserved by this section.[4]

§ 464. Local legislatures have power to limit this easement.— It will be seen from the foregoing sections, and the authorities cited therein, that the effect of these provisions

[1] R. S. U. S., § 2328.

[2] Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. Rep. 753, 774; Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403; People ex rel. Aspen M. & S. Co. v. Dist. Ct. of Pitkin County, 11 Colo. 147, 17 Pac. Rep. 296.

[3] R. S. U. S., § 2339.

[4] Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Broder v. Natoma W. & M. Co., 101 U. S. 274; Atchison v. Peterson, 20 Wall. 507; Basey v. Gallagher, id. 670; Forbes v. Gracey, 94 U. S. 762; Jennison v. Kirk, 101 U. S. 240. But the supreme court of California has held that this provision cannot be construed to enlarge the grant to ditch owners, so as to include a right not "recognized and acknowledged by the local customs, laws and the decisions of the court." Titcomb v. Kirk, 51 Cal. 288, 294. See also Bliss v. Kingdom, 46 Cal. 649.

of statute is to extend the right of eminent domain over mining property.[1] It imposes upon each location a servitude to neighboring or adjoining locations, but power is impliedly given to the states and territories to limit these easements. It constitutes a limitation upon the estate of the locator, restricting, to that extent only, what would otherwise be an exclusive possession.[2] The provision of statute granting "the right of way for the construction of highways over public lands, not reserved for public uses,"[3] has also been held to impress upon the estate in a mining claim a limitation, subject to which the locator or patentee secures his estate.[4] But this is not such an estate as is necessary to be protected by adverse claim against an application for patent.[5]

§ 465. Other implied limitations.— In a subsequent chapter of this work will be discussed the doctrine of apex and extra-lateral rights.[6] While this right does not extend to the surface, it is a limitation upon the estate of the locator, by virtue of which a neighboring proprietor has the right to follow his vein on its dip, and when the facts are ascertained this becomes an express limitation upon his estate, pursuant to which his neighbor is permitted to enter within the vertical planes of his particular piece of land.[7]

§ 466. Possessory rights equal to patent so long as the law is complied with.— A correct understanding of the law demonstrates that so long as the condition imposed by the

[1] R. S. U. S., § 2328; Jennison v. Kirk, 98 U. S. 453; People ex rel. Aspen M. & S. Co. v. Dist. Ct. of Pitkin County, 11 Colo. 147, 17 Pac. Rep. 298; Amador Queen M. Co. v. DeWitt, 73 Cal. 482, 15 Pac. Rep. 74.

[2] Titcomb v. Kirk, 51 Cal. 288; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Broder v. Natoma W. & M. Co., 101 U. S. 274.

[3] R. S. U. S., § 2477.

[4] Hobart v. Ford, 6 Nev. 77.

[5] Rockwell v. Graham, 9 Colo. 36, 10 Pac. Rep. 284. A full discussion of the question as to who should and who need not adverse will be found *post*, Part X, ch. II, arts. B and C.

[6] See *post*, Part XI.

[7] Id.; Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418, 490.

law itself is complied with, the locator of an unpatented mining claim has a valid estate, to all intents and purposes an estate of inheritance, equal in degree to a fee simple for all practical purposes. He is not required to patent his claim, though he may do so, but he is required, in order to hold and maintain his estate, to perform the other condition of annual labor, and the requirements of the local law, in order to hold it. He may patent or not as he sees fit; his estate is good without it, and there is no law requiring it. And so long as he complies with the laws relative to assessment work, as we shall fully set forth in the next chapter, his rights are just as perfect without patent as with it.[1]

§ 467. Possessory actions maintainable — Property in the highest sense of the term.— Thus it is that the courts have come to recognize a mining claim, concerning which all the rules, regulations and customs have been complied with, as property capable of alienation before the issuance of a patent.[2] It has even been held, as we shall see later on, that it could be transferred without a deed. But courts have grown to regard it, and the estate thus secured by location and the performance of annual labor, as property in the highest sense of the term.[3] It may, and generally must, be conveyed by deed.[4] It may be partitioned,[5] and may be bought, sold, conveyed and generally dealt with as patented

[1] Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104. See also Manuel v. Wulff, 152 U. S. 505; Butte City Smoke House Lode Cases, 5 Mont. 497, 12 Pac. Rep. 858.

[2] Sussenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. Rep. 662. See *ante*, §§ 455–457.

[3] Harris v. Equator M. Co., 8 Fed. Rep. 863; Forbes v. Gracey, 94 U. S. 767; Aspen M. Co. v. Rucker, 28 Fed. Rep. 220; Gillis v. Downy, 29 C. C. A. 286; Gaylord v. Place, 98 Cal. 472, 33 Pac. Rep. 484; Spencer v. Winselman, 42 Cal. 479; Hughes v. Devlin, 43 Cal. 502; Watts v. White, 13 Cal. 521; Roseville Alta M. Co. v. Iowa Gulch M. Co., 15 Colo. 29, 24 Pac. Rep. 920; Hale, etc. M. Co. v. Story County, 1 Nev. 88.

[4] Robertson v. Smith, 1 Mont. 410; Hopkins v. Noyes, 4 Mont. 556, 2 Pac. Rep. 280; Melton v. Lambard, 51 Cal. 258.

[5] Dahl v. Confidence M. Co., 8 Nev. 531.

property;[1] and, as we have already seen, possessory actions may be maintained.[2]

§ 468. Estate of inheritance may be selected as a homestead — May be sold on execution.— From what is said in the last and preceding sections and elsewhere it is apparent that the estate acquired by a miner by location is one of inheritance. It may be devised by last will and testament and descends to his heirs.[3] So it has been held that mineral lands of the United States, which have been located and used chiefly as a placer claim, but which have also been used as a residence by the owner and family, and to some extent for pasturing stock and raising vegetables, may be selected as a homestead.[4] And contrary to the general rule, which prohibits land, the paramount title to which is in the United States, from being sold on execution, it is well settled that these possessory rights to mining claims, wherever they are not claimed as exempt, may be seized by attachment and sold upon execution;[5] and since they are regarded in most of the states as real property, it would seem to follow that they should be sold in the same manner as other real property is sold, and that they are subject to redemption.[6]

§ 469. Overlapping locations.— Concerning the law of overlapping locations, there is much of the subject that is

[1] Gillis v. Downy, 85 Fed. Rep. 483; Noyes v. Mantle, 127 U. S. 348; Belk v. Meagher, 104 U. S. 279; Sullivan v. Iron Silver M. Co., 109 U. S. 550.

[2] See *ante*, §§ 447, 450, 451.

[3] Harris v. Equator M. Co., 8 Fed. Rep. 863; Noyes v. Mantle, *supra;* Hess v. Winder, 30 Cal. 349; Gaylord v. Place, 98 Cal. 472; State ex rel. Baker v. District Court (Mont.), 62 Pac. Rep. 882; Hale, etc. M. Co. v. Story County, 1 Nev. 88; Atkinson v. Tabor, 7 Colo. 195, 8 Pac. Rep. 64.

[4] Gaylord v. Place, *supra.*

[5] McKeon v. Bisby, 9 Cal. 137; Hughes v. Devlin, 23 Cal. 501; State v. Moore, 12 Cal. 56, 70; Hamilton v. Southern Nevada M. Co., 88 Fed. Rep. 582.

[6] Id. In Colorado the possessory title to a mining claim may be sold for delinquent taxes, patented and unpatented claims being liable alike to taxation. See Appendix "B."

generally involved in questions arising in adverse suits, and will be considered under that head. But in passing it is proper to say that, as a general rule, almost without qualification, the law applicable to such a condition is that the first in time is strongest in right. As was said by the California court in a recent case: "It is familiar history in mining districts that claims have often been found to overlap one another to a greater or less extent. In such cases the question as to the ground covered by the two locations has been: which location was prior in time and superior in right? And it has never been held, so far as we know, that either of them must wholly fail because of the conflict. On the contrary, in so far as the ground taken was vacant, each location, if properly made in other respects, has been considered to be valid and sufficient."[1]

§ 470. No dower interest attaches in mines before patent.— While the general rule at common law was that dower attached to open and improved mines and quarries,[2] and that rule is recognized in this country so far as it relates to mining and mines elsewhere than on the public domain of the United States, wherever the right of dower exists, nevertheless it did not attach to copyhold lands at the common law, and for reasons equally cogent it may be considered as settled that no dower attaches to unpatented mines in this country.[3] This question was carefully considered in the case mentioned above, which was carried to the supreme court of the United States,[4] in the course of the opinion wherein the court takes occasion to say: "By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and his heirs and assigns,

[1] Doe v. Tiley, 73 Cal. 21, 14 Pac. Rep. 875. See also Argentine M. Co. v. Benedict, 18 Utah, 183, 55 Pac. Rep. 559.

[2] 10 Am. & Eng. Encyc. Law, p. 158 (2d ed.). See also *post*, Part XII, ch. II.

[3] Black v. Elkhorn M. Co., 52 Fed. Rep. 859, 3 C. C. A. 312; Duncan v. Nevassa Phosphate Co., 137 U. S. 547; 1 Scrib. Dower, p. 363.

[4] Black v. Elkhorn M. Co., 163 U. S. 449.

and there is no condition that hampers the right to convey by incumbering it with an inchoate right of dower. And until he does some act towards paying the purchase-money he obtains no vested right of purchase or to claim a patent."[1]

While this decision on its face may seem to be somewhat at variance with the doctrine announced in the foregoing sections, that a mining location properly made constitutes an estate of inheritance, it is nevertheless in line with the firmly fixed opinion of both bench and bar in the mining states — that school of contemporaneous construction whose interpretation should not be wholly ignored. Moreover, it agrees with the letter of the statute, which, by its terms, extends no such right; and if by the light of strict criticism a seeming contradiction is evolved, and an enlarged estate of the same character in one case is diminished in another, it is better that the law be settled upon the line of preconceived opinion, even at the expense of a slight warping of the statute, than that a decision be made which would unsettle many titles and furnish excuse for ruinous litigation.

[1] Citing Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428; Shepley v. Cowan, 91 U. S. 330.

CHAPTER II.

OF ANNUAL LABOR AND ASSESSMENT WORK.

§ 475. The statutory requirements — Definitions.
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496. How annual labor may be proved.
497. Development work is required by Canadian law.
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§ 475. The statutory requirements — Definitions. — As a condition precedent to holding and operating mining property within the mining states and territories, the statute

requires that: "On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. . . . And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after forfeiture and before such location."[1]

This act was amended in 1875 so as to allow work done in a tunnel, the property of the owner or owners of the claim, to apply in satisfaction of the statute in the same manner, and to the same extent, as if such work had been done upon the surface.[2] The work thus required has been designated by various titles by the different courts which have had occasion to construe these acts of congress, some courts styling it as annual labor,[3] and others as assessment work,[4] while the land office usually designates it as representation work.[5]

§ 476. The statute had its birth in the customs of the miners.— The experience of miners, from the beginning of mining in California and the western states and territories, demonstrated that some rule or regulation, requiring

[1] Act of May 10, 1872, 17 Stat. at L., p. 92, § 5; R. S. U. S., § 2324.

[2] Act of Feb. 11, 1875, 18 Stat. at L., p. 315; Supp. to R. S. U. S., vol. 1, p. 62.

[3] See *post*, § 481, note 3, p. 452; Honaker v. Martin, 11 Mont. 91, 27 Pac. Rep. 397; Slavonian M. Co. v. Perasich, 7 Fed. Rep. 331. See also Wade on Mining Law, § 29.

[4] Utah Mining & Mfg. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 183, 21 Pac. Rep. 1002; Klopenstine v. Hays, 20 Utah, 45, 57 Pac. Rep. 712; Thompson v. Jacobs, 8 Utah, 246, 2 Pac. Rep. 714. And this is the term usually employed by miners in speaking of the statutory requirements. See also Barr. & Ad. Mines, p. 263.

[5] General Circular of Oct. 31, 1881, §§ 17, 18; Copp's Min. Lands, p. 35. See also Renshaw v. Switzer, 6 Mont. 464, 13 Pac. Rep. 127; Chambers v. Harrington, 111 U. S. 350. The last circular of the land office classes it as annual expenditure. Circular of General Land Office, June 24, 1899, pages 14, 15, 37.

a certain amount of work to be done upon each claim, during a stated period, was absolutely essential. And this provision of the federal statute is merely declaratory of the rules of the miners prior to its enactment, and a recognition of those rules and regulations.[1] As said in an early case: "The mineral lands being thus open to the occupation of all discoverers, one of the first necessities of a mining neighborhood was to make rules by which this right of occupation should be governed as among themselves, and it was soon discovered that the same person would mark out many claims of discovery and then leave them for an indefinite length of time without further development and without actual possession, and seek in this manner to exclude others from availing themselves of the abandoned mine. To remedy this evil a mining regulation was adopted that some work should be done on each claim in each year or be treated as abandoned."[2]

A close inspection of these early requirements discloses that there is no material difference between them and the federal statute; the only difference being that they required a certain amount of work monthly or quarterly, while the federal statute, as noted in the last section, requires that this be done annually.

§ 477. Miners' rules have their origin in the Mexican law, and in customs of England.— A great many of the miners' rules and customs, including the one requiring some representation work to be done upon each claim, had their origin, or at least a precedent and sufficient warrant for their existence, in the Mexican law, and came to us with the cession of a portion of our western country by that republic. This law usually required, as a condition to save the claim from denouncement, which was necessary before a relocation of the claim could be made, the performance of

[1] Yale, Mining Claims and Water Rights, p. 81; St. John v. Kidd, 26 Cal. 263; Morton v. Solambo C. M. Co., id. 527; Strang v. Ryan, 46 Cal. 33; De Puy v. Williams, 26 Cal. 309.

[2] Chambers v. Harrington, 111 U. S. 350.

a certain amount of work by a specified number of men within a given time, and usually provided for forfeiture in case of non-compliance with this condition.[1] This rule has been abrogated by recent enactments in Mexico,[2] so that all that is now required there is that "all owners or proprietors of mines shall be obliged to pay the sum of ten dollars annually for each one of the fields (pertenencias) of which their grants are composed."[3] In old Mexican law, the principle of *strictissimi juris* was applied to assessment work,[4] and this rule should be applied in the administration of our laws upon that subject; that is to say, while no presumption of duty done should be destroyed thereby, neither perfunctory work nor dog-in-the-manger policy will satisfy the statute. It is proper to observe, in passing, that both the Cornish and Devonshire customs, as well as those of the high peak of Derbyshire, required similar representation work.

§ 478. Time within which to perform.— From the date of the enactment of the law of 1872[5] until 1880, there was quite a diversity of opinion as to when the date for performing annual labor commenced. Courts of respectable standing, as well as mining lawyers throughout the country, were on both sides of the question, some holding that the work should be done within a year from the date of location, while others maintained that the period for performing such work did not begin until the first of the next year. We do not deem it necessary, however, to cite these contrary decisions, as the matter was finally permanently set at rest by congress by the enactment of the law of January 22, 1880,[6] containing the following proviso: "Provided, that the period within

[1] Mining Ordinances New Recop., ch. 7, required work with four persons, and a failure for four months forfeited the claim. Gamboa, Com., ch. 17, §§ 1 to 6; Rockw. Span. & Mex. Law, p. 309; Yale, Mining Claims and Water Rights, p. 81.

[2] Mining Law of Mexico, 1899, p. 14, § IV, art. 22.

[3] Id., p. 24, art. 4, § 8, div. 2.

[4] Yale, Mining Claims and Water Rights, p. 362.

[5] R. S. U. S., § 2324.

[6] 21 Stat. at L., ch. 9, p. 61; Supp. to R. S. U. S., vol. 1 (2d ed.), p. 276. For statement of old rule, see Coleman v. Clements, 23 Cal. 245.

which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini, eighteen hundred and seventy-two." So that now, it makes no difference whether a claim is located on the first day of January, the last day of December, or upon any day between those dates of a given year, the locator, in the absence of state statute requiring "location," or "discovery" work, has all of the following year within which to do any work, and at all events, the whole of that time to perform the one hundred dollars' worth of work or make the one hundred dollars' worth of improvements required by the statute.[1] It is also well settled that each year must be considered as an entirety, and the expenditure of any amount of money in labor and improvements upon a mining claim during any one year does not relieve its owner from making the statutory expenditure the following year.[2]

§ 479. **Where work should be done.**—It may be said generally that labor or improvements, to the amount required by statute, placed anywhere upon the surface of the ground within the boundaries of the location, or beneath the surface, within vertical planes drawn down through those boundaries, will be sufficient in any case.[3] It is definitely settled, however, that it is not absolutely essential that this work be done within the boundaries of the claims upon which it is sought to be applied, if it is done on adjoining or neighboring ground in sufficiently close proximity so that it tends to develop the claim in question.[4]

[1] Land Office Circular of June 24, 1899, p. 20, sec. 15; Slavonian M. Co. v. Perasich, 7 Fed. Rep. 331. See also Thompson v. Jacobs, 8 Utah, 246, 2 Pac. Rep. 614.

[2] Belk v. Meagher, 3 Mont. 65; Mills v. Fletcher, 100 Cal. 142, 34 Pac. Rep. 637; Atkins v. Hendree, 1 Idaho, 107; Merrill, 5 C. L. O. 5; Ferguson v. Belvoir M. Co., 15 L. D. 43.

[3] Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886; McGarrity v. Byington, 12 Cal. 426.

[4] Kirk v. Clark, 17 L. D. 190; Jackson v. Roby, 109 U. S. 440; DeNoon

In applying this doctrine the courts are inclined to be very liberal, and it has been held, correctly, we think, that it makes no difference whether the claim where the work is actually done is patented or unpatented, so long as it tends in fact to develop, and is done for the purpose of developing, the unpatented claim, and as assessment work upon it.[1] Thus, in a recent case in the federal court, it was held that work done or improvements made for the purpose of developing the ground embraced in the location, outside of the limits of the claim, is as available for holding it as if done within its boundaries; and the running of a tunnel for the purpose of developing two separate mining claims, owned by the same person, is to be credited to both of said claims; and to the extent that such work applies in satisfaction of the statutory requirement, the owner is relieved from performing work upon the surface or elsewhere.[2] And as said by the supreme court of Idaho: "The labor is not required to be applied in any particular manner, but so that it is unquestionably devoted to such claim."[3] But where all or any of the work or improvements are outside the exterior lines of the claim, it then becomes a question of fact as to whether the claim is developed by means thereof.[4]

v. Morrison, 83 Cal. 163, 23 Pac. Rep. 374. The supreme court of California holds that work done upon agricultural ground belonging to the claimant is sufficient if it tends to develop. Richard v. Wolfling, 98 Cal. 195, 32 Pac. Rep. 971. See also Hall v. Kearney, 18 Colo. 505, 33 Pac. Rep. 373; Chambers v. Harrington, 111 U. S. 350.

[1] Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439. And see authorities in note 4, *ante*, p. 441.

[2] Book v. Justice M. Co., 58 Fed. Rep. 106.

[3] Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413. See also McGarrity v. Byington, 12 Cal. 426; Axiom M. Co. v. White, 10 S. Dak. 198, 72 N. W. Rep. 462; Chambers v. Harrington, 111 U. S. 350.

[4] Hall v. Kearney, *supra;* Doherty v. Morris, 17 Colo. 105, 28 Pac. Rep. 85. But in such case the court will not be permitted to substitute its judgment for that of the owner of the claim as to whether such work tends to develop, or as to the wisdom or expediency of the means employed for developing the mine. Mann v. Budlong (Cal.), 62 Pac. Rep. 120, citing Stone v. Bumpus, 46 Cal. 221; Lindl. on Mines, § 631. And see *post*, § 483.

§ 480. Same subject — Work upon one of several claims held in common.— Following the same line of reasoning pursued in the last preceding section, it may be stated, and the statute expressly permits, that the owner of several claims held in common or as one group may expend his money or perform labor or make improvements upon any one of them for the benefit of all; the only requirement in this connection being that the claims shall be in such proximity to each other, some cases say actually contiguous, as that work done in this manner tends to develop them all, and that the labor or improvements be sufficient in value to satisfy the requirement of the statute for all the claims in the group, that is, an amount aggregating one hundred dollars for each claim.[1] This was a convenient method of working and operating mining claims before the statute, and the purpose and object of so working were fully considered by the supreme court of the United States, and the decision made, which has been followed as the law, that it is perfectly competent for the owners of different locations to combine and to work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them.[2] By this means, that is, the combination of efforts, greater development and more satisfactory results could be obtained than by each person working his own claim separately. Essential to the application of this doctrine, however, there must be a community of interest in the particular development work so that each owns a permanent interest therein, or there must be a community of interest in the claims benefited, and the work done on one for all, or there must be

[1] R. S. U. S., § 2324; Mount Diablo M. & M. Co. v. Callison, 5 Sawy. 439, 17 Fed. Cas. 918, No. 9,886; Chambers v. Harrington, 111 U. S. 350; Kirk v. Clark, 17 L. D. 190; Good Return M. Co., 4 L. D. 221; DeNoon v. Morrison, 83 Cal. 163, 23 Pac. Rep. 374; Axiom M. Co. v. White, 10 S. D. 198, 72 N. W. Rep. 462; Nil Desperandum Placer, 10 L. D. 198; Eberle v. Carmichael, 8 N. Mex. 169, 42 Pac. Rep. 95.

[2] Jackson v. Roby, 109 U. S. 440. See also Axiom M. Co. v. White, *supra;* St. Louis S. & R. Co. v. Kemp, 104 U. S. 655.

identity of ownership in the work done and the claims benefited, and this must be a *bona fide* permanent ownership.

§ 481. Discussion and comparison of cases as to claims held in common, whence the divergence, and what the true rule.— Many of the cases hold as essential to the application of the rule, that to apply work done on one claim for the benefit of all claims held in common the claims must be adjoining or contiguous in the sense that they adjoin or come in close contact with each other, or at least are not completely separated, and such is the express holding of the cases.[1] When we look at the statute itself, however, and what would seem to be the general policy of the law, the reason for this line of decisions disappears, or, at best, becomes very shadowy. And first as to the general policy. The statute says: "When the claims are held in common such expenditure may be made upon any one claim."[2] This invites another inquiry: What is meant or intended by "in common?" Manifestly one of two conditions: (a) When several owners have interests legal or equitable in all the claims so held and intended to be worked, or (b) where the same owner, person or corporation owns many claims grouped and contiguous, in the sense that they are near to each other and not remotely separated. Of course, in any case, the work, as we have already seen, must tend to develop.

In this connection it is well to examine the word "contiguous" as used by the courts. Do they mean or intend to mean that it must be adjoining in all cases? Webster gives the definition of "contiguous" that seems to agree with all

[1] Mt. Diablo M. Co. v. Callison, 5 Sawy. 439, 9 M. R. 616, 17 Fed. Cas. 918, No. 9,886; Jackson v. Roby, 109 U. S. 440, 27 L. ed. 990; Chambers v. Harrington, 111 U. S. 350, 28 L. ed. 452; s. c. *sub nom.* Harrington v. Chambers, 3 Utah, 94; Royston v. Miller, 76 Fed. Rep. 50; Gird v. California Oil Co., 60 Fed. Rep. 331; Copper Glance Lode, 29 L. D. 542, 549; Emily Lode, 6 L. D. 220; Hall v. Kearney, 18 Colo. 531, 33 Pac. Rep. 373; Wilson v. Triumph M. Co., 19 Utah, 66, 56 Pac. Rep. 300; Fissure M. Co. v. Old Susan M. Co. (Utah), 63 Pac. Rep. 587; Book v. Justice M. Co., 58 Fed. Rep. 106; United States v. Iron Silver M. Co., 24 Fed. Rep. 568.

[2] R. S. U. S., § 2324.

others: "In actual or close contact, touching, adjacent, near." For synonym: "adjoining, adjacent." Of these definitions no word needs redefining except "adjacent," which is said to be: "Lying near, close or contiguous, but not actually touching;" as a field adjacent to the highway; "the adjacent forest," for example; synonym: "adjoining, contiguous, near; adjacent, adjoining, contiguous: Things are adjacent when they lie near to each other without actually touching: as adjacent fields, adjacent villages, etc."[1]

It is settled that work done off the claim may be held to apply upon it if it satisfies the above requirement and facilitates the extraction of ore.[2] Again, the tunnel amendment of 1875 was expressly enacted to permit work so done to apply. And the question arises: How far away may the face of the tunnel (either the statutory face or mouth, or the working face) be, and satisfy the statute? If a rod, why not a mile, so it reaches and satisfies the requirement that it tends to develop the claim and facilitate the extraction of ore? Before attempting to answer these questions, or to reason further upon the question, let us see where this divergence began, the point it has reached, and whether there was ever any reason for all the words used in the decisions.

The first case reported is one in the federal court.[3] There the claims lay substantially as shown in the diagram:

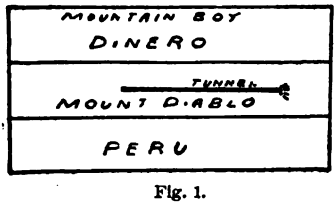

Fig. 1.

[1] Webster's Dict., titles "Contiguous" and "Adjacent."

[2] See authorities in note 1, *ante*, p. 444. See also Kirk v. Clark, 17 L. D. 190; St. Louis S. & R. Co. v. Kemp, 104 U. S. 655, 26 L. ed. 881; Kramer v. Settle, 1 Idaho, 485, 9 M. R. 561; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. Rep. 95; Doherty v. Morris, 18 Colo. 105, 28 Pac. Rep. 85; English v. Johnson, 17 Cal. 107; Remmington v. Bandit, 6 Mont. 136, 9 Pac. Rep. 819.

[3] Mt. Diablo v. Callison, 5 Sawy. 439.

The Mountain Boy, belonging to Callison, was a relocation of the Dinero, upon the theory that the assessment work for one year at least had not been done thereon.

Two major questions were involved:

(*a*) Whether the ore bodies were one or two veins; and

(*b*) Whether the Mountain Boy or the Dinero had the better title.

The last was practically decisive of the case. The work was all done on the Mt. Diablo — at least all assessment work. The court held that work on one claim was sufficient; holding, also, which was not necessary to the decision because not raised, nor important to the decision, that, the claims being contiguous and held in common, work on one was sufficient.

In the Utah case[1] the position of the claims is shown by the diagram on page 447.

Both the Utah court, and Justice Miller for the supreme court, held that work done in Lady of the Lake shaft was sufficient for the Parley's Park — the Parley's Park, Lady of the Lake and Central being owned by the same corporation; citing the Nevada case, and inserting in both opinions as a reason that they were held in common and contiguous, the latter of which, as must be apparent, was not involved in the case, as the opposition was not based upon that ground, but upon the ground that doing work off the claim in question in any case would not satisfy the statute.

The Parley's Park Case[2] cited the Mt. Diablo Case and Jackson v. Roby, which latter case in turn cited Smelting Co. v. Kemp as authority. In order to facilitate our inquiry, as well as to reach the bottom of the question involved, it is necessary to take up these cases, as they furnish the foundation of what we conceive to be the divergence from the letter and spirit of the statute.

Smelting Co. v. Kemp was a case involving the question as to whether more than one location could be lawfully patented in one patent, and it was held that they could,

[1] Harrington v. Chambers, 3 Utah, 94. [2] Id.

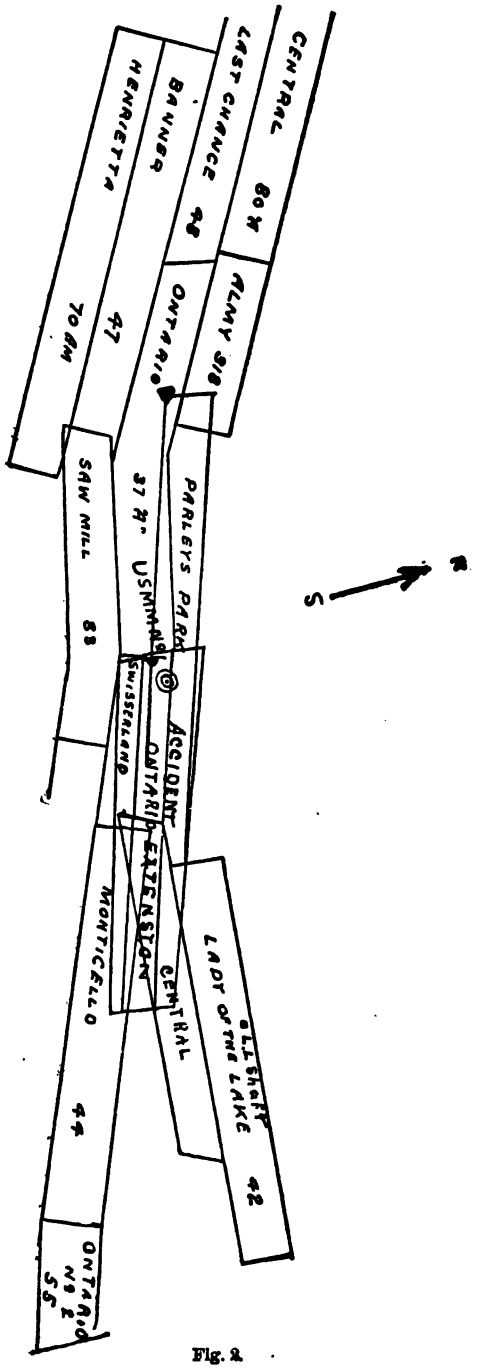
CENTRAL
80 W
LAST CHANCE
BANNER
HENRIETTA
70 NW
47
ONTARIO
MINY SIB
SAW MILL
83
97 N. USMM
PARLEYS PARK
ACCIDENT
ONTARIO EXTENSION
SWISSERLAND
MONTICELLO
44
CENTRAL
LADY OF THE LAKE
E.L. SHAFT
42
ONTARIO
No 2
55
S
E

Fig. 2.

for the reason that more than one location might be embraced in one claim and worked as such, the court taking occasion to observe, what is matter of history in mining operations on the Pacific coast, that miners often combine their capital and efforts in working their claims, as by that means more satisfactory results are obtained. Besides, in placer mining it often becomes necessary, as it does in irrigation, for all to combine in the building of a ditch or flume, either in bringing the water upon their claims for hydraulic mining or sluice-box washing or to carry off the tailings or debris. The court held that "Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or improvements are made for its development; that is, to facilitate the extraction of the metals it may contain; though, in fact, such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material."[1]

Not one word is said about the necessity of the locations being contiguous to or adjoining each other, or contiguous to the point where the work is done. In the next case[2] the work by which the claim was sought to be held was that of constructing a flume and dumping the debris upon the claim in question; not for the improvement of the particular claim, but to its manifest detriment, and to the improvement of other claims held elsewhere. And the court, while holding that the trial court was right in upholding a verdict that neither party had complied with the statute, and that consequently neither was entitled to a patent, took occasion to say, in substance, that the law permits a general system for the development of adjoining claims held in

[1] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636.

[2] Jackson v. Roby, 109 U. S. 440.

common; following the authority in the Kemp case, which did not involve this question, and enunciating *dicta* not at all necessary for the decision of the case in hand.

In a recent federal case in California,[1] there were eighty locations of oil lands comprising one claim and group held by one corporation, and the entire group comprised between eight thousand and nine thousand acres of land. Its form is not given in the reported case, but manifestly it would cover a vast area of country. The point in dispute was as to annual labor done upon one of the claims at a point considerably remote, and over a range of mountains, from the claim upon which the well was sunk, and it was held as matter of law that the work upon the well, although sufficient in amount for all the claims composing the group, did not tend to develop the particular claim in question; the court there holding that it was not sufficient that the claims composing the group be contiguous to and adjoining each other, but that, as respects the particular claim in question, it must be contiguous to the one upon which the work was done.

This, of course, resolves the entire question, when reduced to its last analysis, to the proposition stated by us elsewhere, that the test in all cases, where work is done elsewhere than on the claim, is the one mentioned in Smelting Co. v. Kemp. Does the particular improvement tend to develop the claim in question, or facilitate the extraction of the ores or other minerals it contains? This question is generally one of fact.

In a recent case in the circuit court of the district of Nevada,[2] which was a suit between co-owners disputing a forfeiture alleged, *inter alia*, to have resulted from the failure of one co-owner to contribute his portion of the work done upon the Chicago claim, which had been held and operated by all the parties, by and through a tunnel upon another group of claims, and which was separated from them by one patented claim not belonging to them, the court held as matter of law that the work done upon the other claims through the tunnel could not inure to the benefit

[1] Gird v. California Oil Co., 60 Fed. Rep. 331.

[2] Royston v. Miller, 70 Fed. Rep. 50.

of the Chicago claim, for the sole reason that it was separated therefrom by a claim called the Victorine, a patented claim owned by other parties. A better understanding of this case may be had by the subjoined diagram:

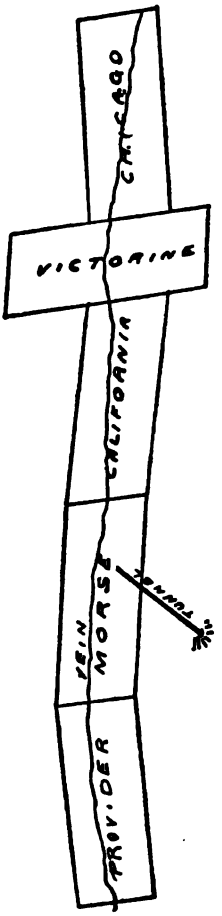

Fig. 8.

With entire deference to the learned judge, whose learning on the line of mining law is unquestioned, we challenge the correctness of his position in this case. It was believed by all parties, if not demonstrated, that the same vein ran through all the claims in dispute. It is unques-

tioned and unquestionable that the right of way existed or could be acquired through the intervening claim to the Chicago claim, and this being so, it cannot be said as matter of law, nor do we think it could as matter of fact, that work done in that tunnel, with the intention of following the vein into the Chicago claim when reached, would not develop the claim. Contrast this case with the Colorado case,[1] where the court held that the question should be submitted to the jury where a tunnel is started in the claims that were attempted to be developed by it and run away from them into patented ground, as to whether such tunnel tended to develop the claims in question.

The following diagram, while not pretended to be correct, will illustrate the situation:

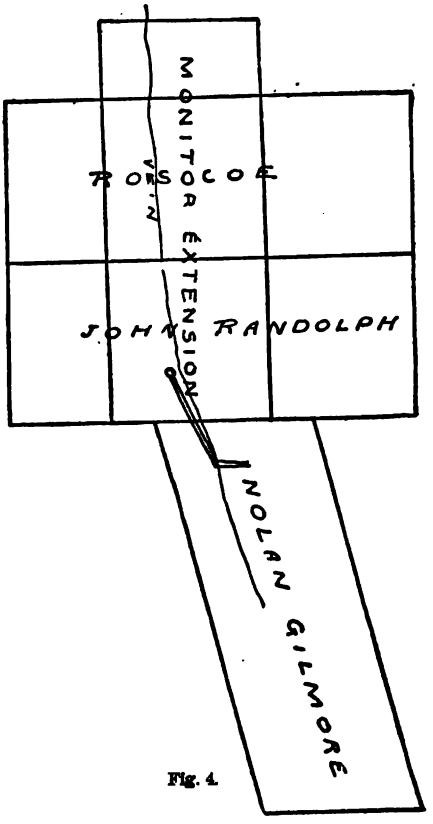

Fig. 4.

[1] Hall v. Kearney, 18 Colo. 531.

The positions, then, of the courts are reduced to this: The circuit court of the southern district of California, speaking by Judge Ross, decides, and correctly, we think, that contiguity of claims to each other, and working as one claim, is not the true and only test. The circuit court for the district of Nevada, speaking through Judge Hawley, says that contiguity, in the sense of being adjoining each other, as applied to a group of claims, is the test. And this, too, in a tunnel case, where the tunnel is selected by the parties and all the parties to the suit, and is run by them for the purpose and with the intention of developing the claims in dispute. Independent of any question of estoppel, as to all the parties in that suit, which ought to prevent them from saying, as between each other, that the tunnel would not develop all those claims, we think if the tunnel statute, the amendment of 1875, means anything, it covers just such a case as this. And further, that the fact as to whether it would or would not develop should have been left to the jury, as was done in the Colorado case.[1]

The statute of 1875 reads as follows: "Where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether lo cated prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act."[2]

If this statute means what it says, and we may observe, in passing, that tunnels as a means of developing claims were recognized and in use long before the passage of this law, or of any statute on the subject,[3] it must mean that a tunnel, projected and run for the purpose of cutting a vein at depth,

[1] Hall v. Kearney, 18 Colo. 531.

[2] Act of Feb. 11, 1875, 18 Stat. at L. 315; 1 Supp. R. S. U. S., p. 62.

[3] Lindl. Mines, § 631, p. 791; Re Coleman, 1 C. L. O. 34; Mt. Diablo M. Co. v. Callison, 17 Fed. Cas. 918. See Bliss v. Kingdom, 46 Cal. 651. See also Stone v. Bumpus, 46 Cal. 218, where it is held that it is not the province of the court to ques-

may be run at any reasonable distance from the claim sought to be benefited, whether on or off the claim itself, and if reasonably intended to develop, and actually run for the purpose of developing, the claim in question, it will satisfy the statute and be held sufficient.

Suppose, then, that the tunnel run to tap the vein in the Provider, Morse & California, and also the Chicago, instead of being run for the former claims, was run solely for the Chicago.[1] True, its course was not directly towards the Chicago, but that could be changed. Under this statute no lawyer, nor any court, would be justified in saying as a matter of law that it did not satisfy the statute, and tend to develop. Can the rule be different if other claims not connected with the one in question are also benefited by it? We think not.

Again, take the Flagstaff case. There it was positively demonstrated that the vein in the Nabob and Virginia crossed the Flagstaff into the Titus. Would any mining lawyer say that if the Flagstaff incline and tunnel were on the Virginia, east of the Flagstaff, it would not develop the Nabob? We insert a diagram of these claims, on page 454, to which we shall have occasion to again refer.[2]

If the courts were united as to what was the real test in all these cases, or if the words "contiguous" or "adjoining" had not been inconsiderately used, we would hesitate at this time to oppose the conclusion maintained by some courts, by *dictum* at least, that, in order that the statute might apply, the claims upon which one particular system of work is done must adjoin each other. But, inasmuch as at least three doctrines and three inconsistent positions have been enunciated by the courts, we feel justified, as we believe it to be the duty of a law writer, in attempting to harmonize the law upon this question, to ascertain and declare the true intent and meaning of the statute.

tion the judgment of the owner as to the manner in which he shall work his claim. See *ante*, § 479, note 4, p. 442. See also Mann v. Budlong (Cal.), 62 Pac. Rep. 160.

[1] See Fig. 8, *ante*, p. 450.

[2] See Flagstaff Case (Utah), unreported; s. c. *sub nom.* Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253.

We feel that we are justified in concluding from the foregoing —

(*a*) That a tunnel may be run on or off a claim or group of claims for the purpose of developing the same, or facilitating the extraction of ores therefrom, and that work done

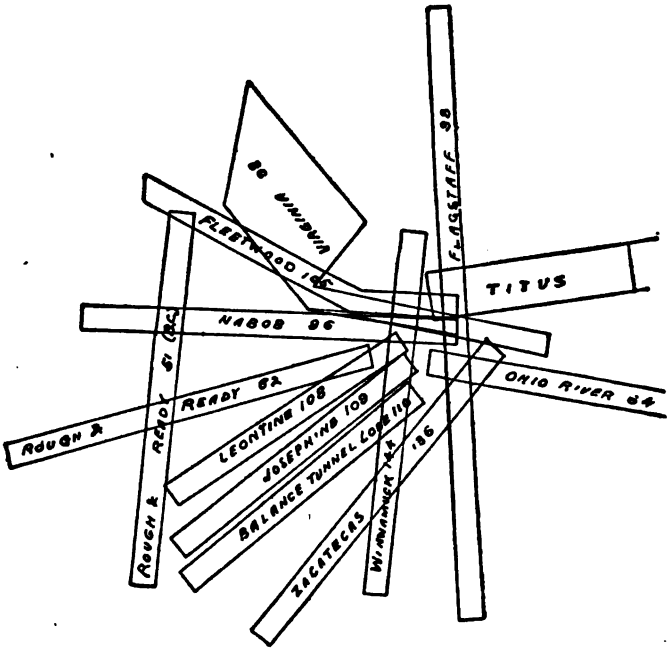

Fig. 5.

in such tunnel may be held and applied upon all claims which can be benefited or developed by said tunnel, whether they adjoin each other or not.

(*b*) That a shaft, inclined or vertical, as a means of development may be sunk upon a claim, whether composed of one claim or more, and if, by means of drifts run therefrom in the direction of the claims in question, they can be developed and the ores extracted from them by or through the shaft, the necessary assessment work and annual labor may be performed in such shaft independent of the question whether they adjoin each other or not.

(*c*) That in all these questions, including the boring of

test wells for oil or gas, it is a question of fact, and the true test as to the applicability of the particular work to develop the claims, whether the work as projected is, from its nature and relationship to the claims, reasonably well intended and calculated to develop a vein or body of ore running through the same, or a body or stream of natural gas or oil, as the case may be. We think this construction harmonizes with the statute, and that it is the only one which does.

§ 482. Work must be performed in good faith upon claims held in common, and must tend to develop.— Where work is done outside the claim for which it is intended, it must be performed in good faith upon a claim or claims held in common, and must be such as will tend to develop the claim upon which it is sought to be applied.[1] But it is not necessary that the same persons own both or all the claims in the group. It is sufficient if the party at whose instance the work is performed, or improvements made, is an owner in all the claims.[2]

We have already seen that there are many cases holding, some by *dictum* and some squarely, that in order to secure the benefits of this statute the claim upon which the work is done must be contiguous to the one claimed to be benefited by it.[3] But a careful reading of the statute discloses that it contains no requirement that the claims be contiguous. The provision is, "but where such claims are held in common, such expenditure may be made upon any one

[1] Justice M. Co. v. Barclay, 82 Fed. Rep. 554; De Noon v. Morrison, 88 Cal. 163, 23 Pac. Rep. 374; Fissure M. Co. v. Old Susan M. Co. (Utah), 63 Pac. Rep. 587; Andromeda Lode, 13 L. D. 146; Honaker v. Martin, 11 Mont. 91, 27 Pac. Rep. 397; Remington v. Baudit, 6 Mont. 136, 9 Pac. Rep. 819; Bishop v. Baisley, 28 Oreg. 119, 41 Pac. Rep. 936; Jackson v. Roby, 109 U. S. 440.

[2] De Noon v. Morrison, *supra*.

[3] *Ante*, § 481 and cases cited; Justice M. Co. v. Barclay, *supra;* Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 56 Pac. Rep. 300; Klopenstine v. Hays, 20 Utah, 45, 54, 57 Pac. Rep. 712; Mount Diablo M. Co. v. Callison, 5 Sawy. 439, 17 Fed. Cas. 918, No. 9,886; Chambers v. Harrington, 111 U. S. 353; Royston v. Miller, 76 Fed. Rep. 50.

claim."[1] We can see no good reason why any court, in construing this section or passing upon the sufficiency or insufficiency of work done under this provision, would be justified in reading into the statute the word "contiguous," any more than courts were justified in reading the words "known mines" into the statutes relating to railroad grants and the reservation of minerals thereunder.[2] We think, when the reasons for this statute are carefully considered and correctly understood, the matters to be determined in any particular case are, first, are the claims held in common? and second, is the work such that it tends to develop? And this position fairly harmonizes with the best-considered cases on this subject.[3]

§ 483. Same — Whether work tends to develop is a question of fact.— From the foregoing discussion, we believe, as previously stated,[4] that it must generally be a question of fact for the court or jury, whether the work sought to be applied upon a particular claim is such as is in its nature calculated to, and in fact does, tend to develop that particular claim. The court ought not, unless the facts are such that reasonable men cannot differ concerning them, to say in any particular case that the work done does or does not tend to develop the claim. Of course, there are extremes both ways, when it becomes a question for the court to determine as matter of law, as, for instance, where the claims are at such great distance from each other that it would be impossible for work done upon one to have any tendency toward developing the other. But, generally, the matter must be a question of fact.[5] And the tendency of the courts in the best considered cases has been in this

[1] R. S. U. S., § 2324.

[2] 13 Stat. at L., pp. 365, 567; Barden v. Northern Pacific R. Co., 154 U. S. 287, 38 L. ed. 1192.

[3] See Gird v. California Oil Co., 60 Fed. Rep. 531, 541; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Andromeda Lode, 13 L. D. 146; De Noon v. Morrison, 83 Cal. 163.

[4] *Ante*, § 479, note 4, p. 443; also § 481. Assessment work, applicability for jury, Yreka M. & M. Co. v. Knight (Cal.), 65 Pac. Rep. 1091.

[5] See St. Louis S. & R. Co. v.

direction. Thus, in the federal case, the court, while holding that the work claimed was not sufficient to develop the claim in question, because not done close enough to properly develop it, bases its conclusion upon the testimony of the witnesses on both sides showing that the work would only have a very remote, if any, tendency to develop the claim.[1]

In the land office the requirement is that "The proof should show that the improvements have been made for the purpose of developing the particular claim applied for."[2] The statement in an early case in the United States supreme court, that "labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development,"[3] clearly implies that whether "the labor is performed or improvements are made for its development" is one of the facts to be proved in the case.

§ 484. Does not apply to a partitioned claim.— Where several persons who have located a claim jointly, afterwards partition it, each taking a portion thereof, work done thereafter upon one of the segregated pieces will not be considered as work upon any of the other pieces.[4] This, of course, where such pieces are not held in common by any one or more of the original locators, or where two or more pieces are not held or worked in common by the same owners.

Kemp, 104 U. S. 636; Fissure M. Co. v. Old Susan M. Co. (Utah), 63 Pac. Rep. 587; Andromeda Lode, 15 L. D. 146; Gird v. California Oil Co., 60 Fed. Rep. 531.

[1] Gird v. Oil Co., *supra*, p. 542.

[2] John Downs, 7 L. D. 71. See also Andromeda Lode, *supra*. The land department thus makes the question largely one of intention; i. e., if intended as work on or for the claim in question it will pass as such.

[3] Smelting Co. v. Kemp, *supra;* Book v. Justice M. Co., 58 Fed. Rep. 107, 117, and cases there cited. See also Fissure M. Co. v. Old Susan M. Co., *supra;* De Noon v. Morrison, 83 Cal. 163, 23 Pac. 374; Axiom M. Co. v. White, 10 S. Dak. 198, 72 N. W. Rep. 462.

[4] Zeckendorf v. Hutchison, 1 N. Mex. 476, 9 Morr. Rep. 483.

§ 485. What is sufficient as annual labor.— The question as to what would be accepted as compliance with the statute upon the question of annual labor or assessment work is one which has received considerable attention by the courts. It is well settled that such work need not consist of actual excavations upon the same or adjoining ground. The test usually applied here, as in the case of work done outside a claim for its benefit, is, whether it is such as will in fact amount to an improvement upon the claim, and as such is calculated to develop it.[1] Thus, constructing a flume,[2] building a road to or house upon the claim,[3] has been considered as assessment work. As just stated, it is usually a question of fact whether the particular work sufficiently improves and develops the claim, that it may be credited as assessment work done upon it. Thus, a watchman to look after reduction works, houses and barns and other buildings upon the claim, originally placed there for its development, will be considered as assessment work,[4] while, of course, the placing of such a watchman upon a mere naked claim, even though he be paid the same wages, will not satisfy the statute.[5]

§ 486. What has been held insufficient.— Labor or improvements upon mining claims, in order to entitle them to be applied as annual labor or assessment work, should in all cases be permanent and lasting, honestly intended at the time and well adapted for the improvement of the claim. Time spent in the attempt to procure water to run a mill at

[1] Du Pratt v. James, 65 Cal. 555, 4 Pac. Rep. 562; Dibble v. Castle Chief G. M. Co., 9 S. Dak. 618, 70 N. W. Rep. 1055.

[2] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Jackson v. Roby, 109 U. S. 440. But see *post*, § 485, and notes.

[3] Doherty v. Morris, 18 Colo. 105, 28 Pac. Rep. 85; Emily Lode, 6 L. D. 220; Commissioner Williamson to Surveyor-General of Colorado, December 14, 1880, Copp's Min. Lands (2d ed.), 298.

[4] Altoona Q. M. Co. v. Integral Q. M. Co., 113 Cal. 100, 45 Pac. Rep. 1047; Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413; Tripp v. Dunphy, 28 L. D. 14.

[5] Altoona Q. M. Co. v. Integral Q. M. Co., *supra*.

the mine will not always constitute assessment work,[1] and in Oregon it has been held that picking rock from the walls of the shaft or outcropping of the ledge, in small quantities, from day to day, and testing it in the attempt to find the pay chute, cannot be applied as assessment work.[2] In Montana, where a cabin was built two hundred feet away from the outside boundaries of the claim, and originally used as a house for the miners while working on the claim, but which, before the beginning of the suit, had been entirely removed, it was held not a sufficient compliance with the law. In the course of the opinion we find this language: "Work done outside of the claim, if done for the purpose and as the means for taking out the ore, or prospecting and developing the claim, such as running tunnels, drifts, drains or building flumes, or work necessary to the development of the mining claim, would be as available for holding the claim as if done within the boundaries. But building a house or cabin is not one of the necessary means or instruments for extracting ore from the mine. . . . This house was used while other claims were being represented, and was afterwards taken down and rebuilt elsewhere. An attempt seems to have been made to make this house a sort of traveling representation of mines wherever it went. . . . Such a doctrine will not answer. We hold that the work should be done on the claim, or, if off from it, as a necessary means for extracting ore from the claim."[3]

So, in Colorado, it was held that a building erected on a claim cannot be considered sufficient unless it has been placed there for the purpose of benefiting the claim, or for its improvement;[4] the necessary implication being that if it were placed there for its improvement, and did in fact tend to improve it, it would be sufficient.[5] And where the

[1] Du Pratt v. James, 65 Cal. 555, 4 Pac. Rep. 562.

[2] Bishop v. Baisley, 28 Oreg. 119, 41 Pac. Rep. 986. See also Honaker v. Martin, 11 Mont. 91, 27 Pac. Rep. 397.

[3] Remmington v. Baudit, 6 Mont. 136, 9 Pac. Rep. 819.

[4] McCaig v. Bryan, 10 Colo. 309, 15 Pac. Rep. 413.

[5] See Moxon v. Wilkinson, 2 Mont. 421.

building is an ore house, erected for the benefit of an adjoining claim, it is not sufficient.[1] Nor will a road built for the joint benefit of several claims be permitted to apply as annual labor on one.[2] Nor will the expense of survey for a ditch not yet dug,[3] nor work done on a ditch outside the placer, before its location, be accepted.[4]

§ 487. Statute mandatory — Effect of failure to do annual labor.— The statute is mandatory in its requirement that labor shall be done or improvements made upon each claim during each year, and a failure on the part of the locator to do or cause this work to be done in any year after the year in which the claim is located renders it open to relocation.[5] A miner cannot by a mere notice hold a claim without work, especially where there is no intention shown to work it.[6] The work required by the act of congress must be done each year, or the claim is open to location the same as if it had never been located at all, unless the owner of the claim resumes operations "after forfeiture and before relocation."[7]

§ 488. Same — Some special cases noted — How far treated here.— It is not our intention to treat here either the questions of abandonment or forfeiture, except in so far as is considered absolutely necessary. This question will

[1] McCaig v. Bryan, 10 Colo. 300; Lakin v. Sierra Butte G. M. Co., 25 Fed. Rep. 337.

[2] Alice Edith Lode, 6 L. D. 711; White Cloud C. M. Co., 22 L. D. 252.

[3] Stork & Herron Placer, 7 L. D. 359. Nor will traveling expenses about matters connected with the claim be considered as labor upon it. Du Pratt v. James, *infra*.

[4] Trickey Placer, 7 L. D. 52.

[5] Chambers v. Harrington, 111 U. S. 350; O'Reilly v. Campbell, 116 U. S. 418; Strang v. Ryan, 46 Cal. 88; St. John v. Kidd, 26 Cal. 270; DePuy v. Williams, id. 309; Anthony v. Jilson, 83 Cal. 296, 23 Pac. Rep. 419; Jackson v. Roby, 109 U. S. 440; Du Pratt v. James, 65 Cal. 555, 4 Pac. Rep. 562.

[6] Gottschall v. Melsing, 2 Nev. 185.

[7] R. S. U. S., § 2324; Russell v. Brosseau, 65 Cal. 605, 4 Pac. Rep. 645; Carney v. Arizona G. M. Co., 65 Cal. 40, 2 Pac. Rep. 784; Morgan v. Tillottson, 73 Cal. 520, 15 Pac. Rep. 88.

be left to subsequent chapters, where we will attempt a full discussion.[1] There are a few decisions on the question, relating directly to the failure to perform annual labor, which it may be proper to treat here. Thus, in a recent case in the supreme court of Oregon we find this language: "The right (to own and possess mining property) is a valuable one and is protected by law. It continues until there shall be a failure to represent the claim, that is, to do the requisite amount of work within the prescribed time."[2] As said by Mr. Justice Field in the United States supreme court: "And it (the statute) provides that upon failure to comply with these conditions, the claim shall be open for relocation in the same manner as if no location of the same had ever been made, provided the original locators, their assigns or legal representatives, have not resumed work upon it after failure and before relocation. It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is offered for that purpose, but it exacts a faithful compliance with the conditions required."[3]

§ 489. Same — Compliance with federal statute sufficient — When claimant excused from performing. — Some of the state legislatures, in enacting statutes upon the question of mining, have passed laws somewhat in conflict with the federal statute. For instance, an early statute of California, but passed after the federal statute, provided that work must be done upon every mining claim every sixty days, and that a failure to do so constituted a forfeiture. The supreme court of California, as soon as this matter was brought to its attention, promptly decided that such a statute conflicted with the United States law and was therefore

[1] *Post*, this Part, ch. III.

[2] Bishop v. Baisley, 28 Oreg. 119, 41 Pac. Rep. 936. See also St. John v. Kidd, 26 Cal. 264; King v. Edwards, 1 Mont. 235. And in such case the land becomes *publici juris*. Coleman v. Clements, 23 Cal. 248; McGarrity v. Byington, 12 Cal. 426.

[3] Jackson v. Roby, 109 U. S. 440.

invalid.[1] This has been the tendency of the courts in construing state statutes generally.[2]

There are cases, however, where assessment work by the owners of the claim is excused, and where the work done by a trespasser inures to the benefit of the owner of the claim, as, for instance, where they are kept out of possession by threats by the owner of an overlapping claim,[3] or where an agent who has promised to do the work fails to do so and attempts to relocate the ground in his own name;[4] in these and all similar cases the owner will, to the extent that he is thus prevented, be excused from performing annual labor.[5] And this principle applies to the case where one of several co-owners of a mining claim who has undertaken to do the work upon it for a given year fails to do so, but falsely reports that he has done so.[6]

§ 490. Same subject—Statutes excusing annual labor—Who may take advantage of.— Of course, it must be understood that any obstacle placed in the way of the owner, as also any danger liable to come to him in case of an attempt to prosecute his work, must be real and not merely apparent. A mere threat, made several miles away from the claim, that the party making it would do violent injury to

[1] Original Co. v. Winthrop M. Co., 60 Cal. 631. See also Slavonian Co. v. Perasich, 7 Fed. Rep. 331.

[2] Book v. Justice M. Co., 58 Fed. Rep. 106; Wenner v. McNulty, 7 Mont. 30, 14 Pac. Rep. 643.

[3] Utah M. & M. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 183, 21 Pac. Rep. 1002. But the threat must apply to the particular claim and as to work thereon. A general threat as to other matters will not justify omission, nor threats at a distance from the claim, without attempt to execute. Slavonian M. Co. v. Perasich, 7 Fed. Rep. 331. See Belk v. Meagher, 104 U. S. 279. See also *infra*, § 490.

[4] Argentine M. Co. v. Benedict, 18 Utah, 183, 55 Pac. Rep. 559; Haws v. Victoria Copper M. Co., 160 U. S. 303. See also Royston v. Miller, 76 Fed. Rep. 50.

[5] Erhardt v. Boaro, 113 U. S. 527, affirming s. c., 8 Fed. Rep. 692; Morenhaut v. Wilson, 52 Cal. 263; Trevaskis v. Peard, 111 Cal. 599, 44 Pac. Rep. 246; Mills v. Fletcher, 100 Cal. 142, 34 Pac. Rep. 688; Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 24; Robinson v. Imperial S. M. Co., 5 Nev. 44. See also Richard v. Wolfling, 98 Cal. 195, 32 Pac. Rep. 971.

[6] Royston v. Miller, *supra*.

the owner, not followed by any further act of hostility, is not sufficient to justify the owner of a claim in a failure to represent it.[1]

In each of the years 1893 and 1894 congress passed an act, applicable only to those years, permitting the locator of mining ground, upon filing a notice of intention to hold the same, to do so without the performance of any assessment work for that year. And the supreme court of Nevada, which, so far as we have been able to learn, is the only court that has had occasion to construe these particular acts, held that such notices could be given by a party having no real valid title, the notice in that case having been given under the belief by plaintiff that he had secured the interest of two or three original locators under an execution sale, which belief turned out to be erroneous.[2]

§ 491. Who may take advantage of failure to do work — Effect on overlapping claims.— From the general trend of judicial opinion, especially in the authorities cited in the three preceding sections, it is apparent that the failure to represent mining claims is a question solely for determination by the courts in controversies arising between rival claimants to mining property.[3] It is a point that cannot be taken advantage of by a claimant under the agricultural laws;[4] and the question as to whether the applicant has failed, during any year except the one next previous to that in which application for patent is completed, to do the requisite amount of work, is one with which the land department has no concern, and a hearing thereon will not be ordered by it.[5] Where the owner of the senior of two overlapping claims fails to represent his claim, which thereby becomes forfeited,

[1] Slavonian M. Co. v. Perasich, 7 Fed. Rep. 831.

[2] Nesbit v. De La Mar's G. M. Co. (Nev.), 52 Pac. Rep. 609. See also Royston v. Miller, 76 Fed. Rep. 50.

[3] See especially notes 2 and 5 to § 489, *ante*, p. 467.

[4] Coleman v. McKenzie, 29 L. D. 359.

[5] Wolenberg et al., 29 L. D. 302; Barklage v. Russell, 29 L. D. 401, overruling Stewart v. Rees, 21 L. D. 446.

the area in conflict does not thereby become the property of the junior locator, but if he desires to claim it he should do so by an amended location notice, including it within his boundaries.[1] And in the absence of adverse rights intervening in the meantime, this is always permissible.[2]

§ 492. Value of labor and improvements — Not essential that work be paid for.— It is quite obvious that no set rule as to the price of labor can govern in determining the value of the labor or improvements. The amount paid is not controlling,[3] nor is the question as to whether the claim is benefited to the extent of the work claimed conclusive.[4] In this, as in determining the sufficiency of the labor and improvements, the important question to be decided is whether or not the work done tends to develop the claim and is reasonably worth the amount claimed for it. And whether it is or not is a question of fact.[5] Neither is it important or material that the labor or improvements, or any portion of them, have not been paid for, this being a matter entirely between the person performing the labor and the owner of the claim, and one which in no way affects the sufficiency of the labor or improvements.[6] But proof of seventy-five dollars' worth of work during any given year is not proof of compliance with the statute.[7]

§ 493. Work must be performed up to issuance of receiver's receipt.— The mere application for patent will not excuse the owner of mining property from the performance

[1] Oscamp v. Crystal River M. Co., 7 C. C. A. 233, 58 Fed. Rep. 293; Belk v. Meagher, 104 U. S. 279; Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 173; Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 443.

[2] Upon the question of amendments generally, see *ante*, §§ 425–26 *et seq.*

[3] See Coleman v. Curtis, 12 Mont. 301, 30 Pac. Rep. 266.

[4] Mattingly v. Lewisohn, 13 Mont. 503, 35 Pac. Rep. 111. See also Clark v. American Flag G. M. Co., 7 C. L. O. 5; Geo. K. Willard, 4 C. L. O. 67.

[5] Quimby v. Boyd, 8 Colo. 194, 6 Pac. Rep. 462. See also *ante*, § 482; Crown Point G. M. Co. v. Crismon (Oreg., 1901), 65 Pac. Rep. 87.

[6] Coleman v. Curtis, *supra;* Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413.

[7] Mattingly v. Lewisohn, *supra.*

of annual labor.[1] But when application for patent has been made, and these proceedings have reached the stage where the applicant has paid the government price, and the receiver's receipt has been issued to him, he is then the owner of the claim, entitled to have the patent at once issued to him, and the further performance of annual labor is excused.[2] As said by Secretary Schurz: "An entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned."[3]

§ 494. **By whom work should be performed.**— Of course, the work required by law must be done by the owners of the claim or some one of them, where there are more than one, or by some one in their behalf and at their instance and request. Work done in any other manner than this, except where it is done by a trespasser who has forcibly deprived the owner of his claim, as we have previously discussed,[4] will not be considered as work done upon the claim.[5] And each locator and each co-owner owes it to himself and is bound to see that the work is properly done during the statutory period, without waiting to see whether his co-owners actually perform their share. The failure of one or more of the co-owners who have promised the other co-owners to do the annual work will not relieve such other co-owners from the duty of having it performed within the statutory period.[6] But where the owner of a claim, in order

[1] South End M. Co. v. Tinney, 22 Nev. 19, 35 Pac. 89; Ferguson v. Belvoir M. Co., 14 L. D. 43.

[2] Aurora Hill Cons. M. Co. v. Eighty-five M. Co., 34 Fed. Rep. 515, 517; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 36 L. ed. 762; Alta M. & S. Co. v. Benson M. & S. Co. (Ariz.), 16 Pac. Rep. 555; Deno v. Griffin, 20 Nev. 249, 20 Pac. Rep. 308; American Hill Quartz Mine, September 26, 1878, Sickels' Min. Dec. 384; Gold Blossom Quartz Mine, 2 L. D. 767; American Hill Quartz Mine, 5 C. L. O. 114, 6 id. 1. See *post*, § 665.

[3] American Hill Quartz Mine, *supra*. See also Smith v. Van Clief, 6 C. L. O. 2, cited in Sweeney v. Wilson, 10 L. D. 157, 158.

[4] *Ante*, § 489, notes 3, 4, 5.

[5] Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666.

[6] Doherty v. Morris, 18 Colo. 165, 28 Pac. Rep. 85.

to save it from forfeiture, relocates it under a different name, work done upon it and for its benefit, under both names, will be considered as work on the claim, and will be permitted to inure to the benefit of the owner thereof;[1] the controlling question being: Was the work done with the intention of holding the claim and protecting it from forfeiture, and was it sufficient for that purpose? rather than the question: under what name was it done?

§ 495. Same — Work done by equitable owner — When receiver will be appointed to perform work.— A person holding an equitable interest in a mining claim, as, for instance, one who has purchased or otherwise acquired an interest, but has not received the legal title, will be permitted to do the assessment work, which, when done, if sufficient in other respects, will inure to the benefit of the claim and save it from forfeiture.[2] In a recent case in the federal court for the southern district of California, it was held that where mining property which has not been patented is involved in litigation, the title to the whole claim being in dispute, and both claimants being thereby deprived of possession, the court is justified in appointing a receiver to take charge of the property, attend to the performance of the requisite annual labor and hold the same for the benefit of the successful party to the action.[3] This is the only equitable view to take of a situation of this kind. Unless some such course as this were adopted, there would be nothing left for the successful party as the fruits of the litigation.

§ 496. How annual labor may be proved.— Several of the states and territories, notably Arizona, Colorado, Ne-

[1] Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 173.

[2] Book v. Justice M. Co., 58 Fed. Rep. 106. See also Dolles v. Hamberg Cons. Mines Co., 23 L. D. 267; Tam v. Storey, 21 L. D. 440. This is regulated by statute in Nevada and New Mexico. Comp. Laws Nev. 1900, § 2716; Comp. Laws New Mex. 1897, § 2304, copied in full in Appendix "B," § 35, note.

[3] Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. Rep. 673.

vada, Utah and Wyoming, have enacted statutes providing for the manner of making proof of annual labor by the affidavit of some one of the owners, or by some other qualified person, setting forth where, when and at whose instance the labor was performed, and the kind, value and nature of it, as well as the amount actually paid therefor. All these statutes will be found copied at length in the Appendix. Most of them make proof, when made in accordance with their provisions, *prima facie* evidence of the matters contained in such affidavit. This is a direct and simple manner of making proof, and wherever it is possible to do so, proof should be made in substantial accordance with the requirements of the statute.

But while many of these statutes, if not all of them, make failure to file and record such proof a forfeiture of the claim, the authorities are united to the effect that such legislation as this is at most only directory, any attempt at providing for a forfeiture being beyond the powers of state legislation, and that proof of such labor or improvements may be made the same as of any other fact in the case.[1] And this must be the rule. It is the labor, and not the proof of it, that is required by the act of congress. It was undoubtedly the intention of the framers of the federal statute to permit proof of annual expenditure to be made in any competent manner; and there is nothing in the section delegating the power to state legislatures and miners of the district[2] which authorizes the enactment of rules or regulations making the filing of proof of annual labor obligatory. The most that can be said of a statute of this kind, as we view it, is, as said by the supreme court of Montana, that it "relates not to the effect of doing the work or making the improvements as required by law, but to the method of pre-

[1] Book v. Justice M. Co., 58 Fed. Rep. 106; Davidson v. Bordeaux, 15 Mont. 246, 38 Pac. Rep. 1075; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 652; Quigley v. Gillett, 101 Cal. 462, 35 Pac. Rep. 1040; Murray Hill M. Co. v. Havenor (Utah), 66 Pac. Rep. 762.

[2] R. S. U. S., § 2324.

serving *prima facie* evidence of the fact that such requirement has been fulfilled."[1]

Still, as previously stated, such a requirement provides a simple manner of making *prima facie* proof of the performance of annual labor, and it is always advisable, and the safer course to pursue, to make proof as required by the local statute. In a recent case in Utah, since the enactment of its statute, which, however, seems not to have been considered in the case, a surveyor was permitted to testify as an expert, from his knowledge of the claim, whether the work done tended in fact to develop it.[2]

§ 497. Development work is required by Canadian law. The laws of the different provinces in the Dominion of Canada are just as stringent in the requirement that labor must be performed upon mining claims, within stated periods, and, to a certain extent at least, in value, as is the law of the United States or as was the Mexican law, or as it is to-day. The intention is thus manifest, wherever mining is carried on, that one of the conditions of holding the claim, and indeed the only important one, is that it must be worked, or it will be forfeited. These Canadian laws may be of use to the reader, and as they are too much at variance with each other to permit a general statement covering them, we have thought it advisable to give a synopsis of them in the foot-note.[3]

[1] Coleman v. Curtis, 12 Mont. 301, 30 Pac. Rep. 266. See also McGinnis v. Egbert, 8 Colo. 41; Dibble v. Castle Chief G. M. Co., 9 S. Dak. 618, 70 N. W. Rep. 1055; Book v. Justice M. Co., 58 Fed. Rep. 106.

[2] Wells v. Davis, 22 Utah, 322, 62 Pac. Rep. 3.

[3] *Dominion lands in Manitoba and the northwest territories:* Section 81 of Regulations requires one hundred dollars' worth of work each year. Reg. Approved Order in Council, March 21, 1891, sec. 31. This includes the Provisional District of the Yukon.

Quebec: Mining lands are sold on the express condition that within two years the purchaser must expend in working the same not less than five hundred dollars, if for superior metals, and not less than two hundred dollars if for inferior metals; and the commissioner may cancel the sale in default of such performance. Act

§ 498. The doctrine of this chapter restated.— Briefly summarized, then, the law is that the performance of annual labor being the condition upon which mining property may be held, a substantial compliance at least with the require-

1892, 55 & 56 Vict., ch. 20; R. S. Quebec, sec. 1451.

Ontario: The grantee or owner of a mining location must, during the seven years following the issue of a patent, expend in actual mining, exclusive of houses or roads, one dollar per acre during the first two years, and one dollar per acre per year during the remaining five years; and labor is computed at two dollars per man per day. Contiguous locations may be worked together. In default of such expenditure, upon report of the Director of the Bureau of Mines, all rights may be, by order of the lieutenant-governor in council, forfeited. R. S. Ontario, ch. 86, commonly called the Mines Act, Cir., p. 22, § 34.

British Columbia: A free miner or company of free miners, after expending one thousand dollars on each full interest, without any return of gold or other minerals in reasonable quantities, and upon application by all the holders of the claim, may obtain one year's leave of absence. Placer Mining Act, 1891, ch. 26, sec. 39.

Placer mining — Provisional district of the Yukon — Dredging: The regulations require that the free miners' certificate shall be kept alive by work, but does not specify the amount; and where the certificate runs to more than one person, one or more may keep it alive by renewal and the interest of the others becomes thereby forfeited. Regulations, Order in Council, Jan. 18, 1898, sec. 7.

Relative to dredging, the regulations require at least one dredge to be in operation upon the five miles of river leased to him, within two seasons from the date of the lease, and that a failure to work to the satisfaction of the minister of the interior renders the lease null and void. But where there is more than one lease, the operation of one dredge for each fifteen miles saves from forfeiture. Regulations, Order in Council, Jan. 18, 1898, sec. 5.

Manitoba: The grantee and owner of any mining location sold under the provisions of the act must, during the five years immediately following the issuing of the patent, where the quantity contained in the patent exceeds one hundred and sixty acres, spend not less than four dollars per acre during the first five years, and where the quantity is one hundred and sixty acres or less, five dollars per acre during the first five years. The labor must be by grown men at the rate of two dollars and a half per day, or payment for explosives or other mining material for use on the particular parcel of land. Default of making such expenditure, upon report of the inspector, and order of the lieutenant-

ments of the statute is absolutely necessary. In other words, a valid location is the means of acquiring a mining claim, and annual labor is the condition upon which it is held.

While there may not be any mere hair-splitting as to the actual value of the labor, it should be so near the required one hundred dollars in value as that it would be a denial of justice to deprive the claimant of his property or a forfeiture be adjudged.

But when there is proof of a failure to do the necessary work, or when the claimant has pursued a mere perfunctory and dilatory course in attempting to hold his property, the law will not sustain him. In such case, however, the burden is on the person claiming the forfeiture to prove the same by a preponderance of the evidence.

The labor required by the statute may be performed on or off a claim or group of claims so that it tends to develop and to facilitate the extraction of ore, and may consist in any act or work necessary for that purpose, whether it be the running of a tunnel, sinking a shaft, constructing a road in certain cases, the constructing a ditch to convey water or carry off debris, or in short any act, work or improvement which will in its natural and obvious effect enhance the value of the claim and tend towards its development and facilitate the extraction of the minerals it contains.

That where claims are held in common, which means a community of interests, and it would be more equitable in the operation thereof to work them as a group, work may be done on one claim for the benefit of all, or may be done entirely off all the claims, as running a tunnel or procuring water, or the like.

That the majority of cases hold that in order to operate a claim as a group, or a series of locations held in common,

governor in council, forfeits the claim. Mines Act, Statutes of 1897, p. 35, § 9.

New Brunswick: The governor in council may prescribe the number of days' work to be done on each area each year, and provide a forfeiture for failure. General Mining Act, 1891, § 30.

it is essential that they be contiguous in the sense that they adjoin each other, or are not entirely separated. But there is no good reason for this rule or for these decisions, and the better reason seems to be, and one nearer in consonance with the entire spirit of the law, that the test in all cases which should be applied to annual labor is whether the work or improvements tend to develop the claim, and facilitate the extraction of the mineral and valuable contents therefrom.

Any labor or improvements meeting this requirement will satisfy the statute; nothing else will.

That each year is an entirety and stands independent of all others, and that no amount of work done or improvements made in one year will answer for another year.

That the time in which annual labor is to be performed begins with each calendar year, and the first year begins with the commencement of the calendar year next succeeding the date of location.

That proof of the performance of annual labor is required to be made by affidavit in many of the states and territories, and, while some of the local statutes assume to declare a forfeiture for failure to make this proof in the manner and within the time provided by statute, such statutes are merely directory, and the fact of labor is the test of compliance with the statute rather than the mode of making proof thereof, and that any attempt on the part of a state legislature to forfeit a claim for failure to make the proof in a particular manner is beyond the power of the legislature and void. Inasmuch, however, as most of the legislatures have made these proofs, when so made, *prima facie* evidence of the fact of annual labor, a sort of perpetuation of the proof thereof, and inasmuch as they are made competent evidence, which would be valuable in case of the death of the party performing the labor, it is best to comply with these statutes as to recording proof of annual labor, and thus perpetuate this evidence.

CHAPTER III.

OF FORFEITURE, ABANDONMENT AND RESUMPTION AFTER FORFEITURE.

ARTICLE A.

Introduction, Definition and General Principles.

§ 507. Forfeiture and abandonment — General observations.
508. Definition of abandonment and forfeiture as used in mining.
509. Definitions of abandonment.
510. Abandonment as viewed and defined by the courts prior to the statute.
511. Same subject — Sometimes mixed question of law and fact.
512. Same — Confined to possessory titles — Question of act and intention — Conveyance to alien.
513. Loss of discovery by abandonment — New discovery — Abandonment by amendment to application for patent — How made available.
514. Abandonment claimed by one co-tenant against another.
515. Forfeiture defined.
516. Forfeiture pursuant to agreement or a statute — Strict construction required.
517. Forfeiture must be claimed and taken advantage of, but does not result from change of location or sale.

§ 507. Forfeiture and abandonment — General observations.— While the words "forfeiture" and "abandonment" are words of a totally different meaning, as a general rule, and in general literature, in mining law it is sometimes quite different. It will be necessary in considering this subject to define at considerable length the meaning of the word "abandonment." We shall also have to deal at length with the circumstances under which a forfeiture occurs. Stated broadly, our purpose in this connection is to enumerate and define those circumstances where a miner may lose his claim by operation of law, generally ascertained and denominated by the phrase "abandonment and forfeiture."

§ 508. Definition of abandonment and forfeiture as used in mining.—The meaning of the terms "abandonment" and "forfeiture," as employed in the mining law, is generally, but not always, synonymous, differing in this respect from the general law. In mining law each accomplishes the same end, and generally mean the circumstances under which the loss of a miner's interest in a mining claim is accomplished, by operation of law coupled with the act of the co-owner or other person.[1] An abandonment can be said to take place only, as a general rule, where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess or claim it for himself, and regardless of, and indifferent to, what becomes of it in the future.[2]

§ 509. Definitions of abandonment.— The definition of "abandonment," standing alone, as applied to mining law, as distinguished from its other applications, as we shall see later, is not different from that used generally in the books in its ordinary acceptation. Property is said to be abandoned when it is thrown away, or its possession is voluntarily forsaken by the owner, in which case it will become the property of the first occupant; or, when it is involuntarily lost without the hope and expectation of again acquiring it, and then it becomes the property of the finder, subject to the superior claim of the owner.[3] Abandonment includes both the intention to abandon and the act by which the abandonment is carried into effect.[4] To constistitute an abandonment there must be a concurrence of the intention to abandon and the actual relinquishment of the property so that it may be appropriated by the next comer.[5] It is stated by Bouvier to be "the relinquishment or sur-

[1] Wiseman v. McNulty, 25 Cal. 230.

[2] Richardson v. McNulty, 24 Cal. 429.

[3] 1 Am. & Eng. Encyc. Law (1st ed.), p. 2; Stone v. Geyser Q. M. Co., 52 Cal. 315.

[4] Id.; Bell v. Bedrock Tunnel Co., 36 Cal. 214.

[5] Judson v. Mallory, 30 Cal. 299; Derry v. Ross, 5 Colo. 295.

render of the rights of property from one to another."[1] This latter definition, however, will hardly do in mining, in states where the recording statutes require written conveyances. It would have been good under the old rule, where titles were acquired by mere verbal transfer of possession, but at the present time this distinction should be observed: Abandonment is the relinquishment of the owner's right over the property, and an ending of the right to the property with that act — a restoration to the public domain; while a grant is a continuation of the right, but a parting with it by the grantor to the grantee. Or, speaking of abandonment, as said in an English case: "The relinquishment of a right. It implies some act of relinquishment, generally by the owner, without regard to any future possession by himself or another, but with an intention to abandon."[2]

§ 510. Abandonment as viewed and defined by the courts prior to the statute may be useful in this branch of our inquiry, to prevent confusion and to show the views which the courts have taken of this matter. Some courts have thought that an abandonment could not be completed until the statute of limitations had run against the party alleged to have abandoned his claim. Other courts took the view that the assertion of new rights by a subsequent claimant was essential. The true rule, as we take it, is that abandonment, no matter how unequivocally made, does not work an estoppel until the assertion and acquisition of new and adverse

[1] Bouvier's Law Dict., tit. "Abandonment."

[2] Hale v. Oldroyd, 14 M. & W. 789; Waring v. Crow, 11 Cal. 366. In a late case in Montana where the owner of a mining claim had quitclaimed his interest to another in effectuation of a sale, it was contended that the sale and quitclaim amounted to an abandonment, as against an execution creditor, and the purchaser thereunder, who had seized and sold it under execution to such purchaser. But the position was denied by the court. Butte Hardware Co. v. Frank, 65 Pac. Rep. 1. See also Derry v. Ross, 5 Colo. 295; Murley v. Ennis, 2 Colo. 300. In New Mexico there is a statute regulating the abandonment of mining claims. See Appendix "B," § 63, N. Mex. note.

rights by some subsequent claimant. Thus, it has been held that abandonment may arise from a single act, and a party having once abandoned his claim will not be permitted to come in within the time allowed for commencing civil actions and re-assert his right to resume, to the prejudice of those who have in the meantime in good faith made a valid appropriation of it.[1]

It has also been held that a failure to work the claim as required by the local mining laws constitutes an abandonment of it.[2] But we think this should rather be considered as a forfeiture than as an abandonment. There can be no strict abandonment of property without the intention to do so, while forfeiture may occur by reason of the failure to perform the condition. The bare lapse of time, short of the statute of limitations, and unaccompanied by other circumstances, is not of itself an abandonment,[3] to which may be added the further statement that the mere circumstance that the statute had run would be immaterial if no intervening adverse claim had been asserted.

§ 511. Same subject — Sometimes mixed question of law and fact.— Abandonment is said sometimes to be a mixed question of law and fact. Of course, where the facts are disputed, it must be left to the jury as in all other cases. But like nearly all other questions of fact, where it assumes such a relative position as that reasonable men cannot differ as to what the conclusion would be, it is then a question of law for the court. It has been repeatedly held by reputable courts to be a mixed question.[4] An abandonment will never be presumed, but must be proved by him who asserts it.[5] Ordinarily, and for all practical purposes, the perform-

[1] Davis v. Butler, 6 Cal. 510.

[2] De Puy v. Williams, 26 Cal. 310.

[3] Mallett v. Uncle Sam M. Co., 1 Nev. 188; Johnston v. Standard M. Co., 148 U. S. 360, 37 L. ed. 480. See note 2, p. 474, § 509, *ante*.

[4] Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; Doak v. Brubaker, 1 Nev. 218; Weill v. Lucerne M. Co., 11 Nev. 200.

[5] Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 173; Nichols v. Mackintosh, 19 Colo. 22, 34 Pac. Rep. 278.

ance of annual labor is the test, and this involves the question of intent;[1] and mere lapse of time does not constitute abandonment, but is merely evidence of it.[2]

§ 512. Same — Confined to possessory titles — Question of act and intention — Conveyance to alien. — Although the title to mining claims has at all times been of that class which might be lost by abandonment, and although a technical abandonment may at this time be proved concerning any kind of possessory title, the subject has lost much of its importance except in connection with the annual labor acts.[3] To constitute an abandonment there must be a going away, and a relinquishing of rights, with the intention, never to return. A voluntary and independent purpose to surrender whatever claim the person has, to the next comer, is essential. It is thus a question of act and intention, and the fact is to be found from the intention and the act, when considered together, in connection with all the circumstances in the case.[4] The testimony of the fact of abandonment by a former owner is conclusive evidence thereof;[5] and evidence upon this question is admissible under the general issue.[6] But there must be an abandonment in fact. A mere belief on the part of the relocator that such is the case is not sufficient to establish one.[7] It has been decided

[1] De Puy v. Williams, 26 Cal. 210; Doherty v. Morris, 11 Colo. 12, 16 Pac. Rep. 911.

[2] Moon v. Rollins, 36 Cal. 333.

[3] Ferris v. Coover, 10 Cal. 589, 631.

[4] Lakin v. Sierra Buttes M. Co., 25 Fed. Rep. 337, 11 Sawy. 232; Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; Mallett v. Uncle Sam M. Co., id. 188; Myers v. Spooner, 55 Cal. 257; Murley v. Ennis, 2 Colo. 300; Taylor v. Middleton, 67 Cal. 356, 8 Pac. Rep. 594; Marshall v. Harney Peak M. Co., 1 S. Dak. 350, 47 N. W. Rep. 290; Derry v. Ross, 5 Colo. 295; Weill v. Lucerne M. Co., 11 Nev. 200–212.

[5] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361. For abandonment statute, see N. Mex. note, § 63, Appendix "B."

[6] Bell v. Bedrock T. & M. Co., 36 Cal. 214; Willson v. Cleaveland, 30 Cal. 200; Morenhaut v. Wilson, 52 Cal. 263.

[7] Phœnix M. Co. v. Lawrence, 55 Cal. 143; Stone v. Geyser M. Co., 53 Cal. 315.

by the highest authority[1] that a conveyance of an unpatented claim is not an abandonment of it.

§ 513. Loss of discovery by abandonment — New discovery — Abandonment by amendment to application for patent — How made available.—An abandonment, in order to be available in mining, must be claimed by a subsequent locator qualified to make a location, and must be accomplished by a relocating of the entire claim, or at least the discovery of it, for a mere failure to do the annual assessment work will not *per se* amount to abandonment. The owner, as we shall see hereafter,[2] has the right of resumption, and if he exercises this right before his abandonment is taken advantage of by another, he will lose no rights.[3] In such case, the position of the junior locator is not aided by the fact that his location rests upon the discovery of a vein which crossed the original location.[4]

Where a person who has located a mining claim permits an adjoining occupant to patent that part of his claim upon which his discovery shaft is located, this is the equivalent of an abandonment of the entire claim, and the remaining portion thereof reverts to the condition of public lands, and is relocatable; and this rule applies even though the patentee is the junior locator.[5] This decision, of course, rests upon the principle that the owner of a senior claim, having stood by and permitted the junior locator to patent his discovery, is considered to have abandoned it. But if, before valid intervening rights are established, or, as in this case, after the patenting by the junior locator of the ground containing the original discovery, and before relocation by another, the original locator makes a valid discovery of mineral elsewhere upon his claim, this will be sufficient.[6]

[1] Manuel v. Wulff, 152 U. S. 505.

[2] *Post*, this chapter, art. D.

[3] Belk v. Meagher, 104 U. S. 279; Oscamp v. Crystal River M. Co., 58 Fed. Rep. 293, 7 C. C. A. 233.

[4] Oscamp v. Crystal River M. Co., *supra*.

[5] Miller v. Girard, 30 Colo. App. 278, 33 Pac. Rep. 69.

[6] Silver City G. & S. M. Co. v. Lowry, 19 Utah, 331, 57 Pac. Rep. 11; Erwin v. Perego, 93 Fed. Rep. 608, affirming s. c., 85 Fed. Rep. 904.

In a recent case in the United States supreme court, the right to abandon a portion of the claim by amendment to application for patent was recognized.[1] This, we take it, should be the general rule, the question being merely as to the best means of accomplishing it, whether by an amended location notice or declaratory statement, or merely an amendment to the application for patent. Of course, this latter mode would be sufficient where patent has been applied for; but where the locator, for any reason, desires to abandon a portion of his claim and hold the remainder, he should be permitted to do so by an amended location.

§ 514. Abandonment claimed by one co-tenant against another.—It seems almost unnecessary to state, in view of the well-established rule of law that the possession of one co-tenant is the possession of all, that there can be no abandonment by one co-tenant to another. The interest of one co-tenant may be acquired by another only in two ways: (a) by the statutory notice for assessment work, which will be considered in the next chapter, and (b) by grant. In some early cases, however, there were *dicta* tending to indicate that one co-tenant might abandon to another.[2] This probably grew out of the oft-repeated practice in California of passing the possessory title to mining claims by merely delivering the possession without any instrument in writing. In a later California case this question came squarely before the court for decision, and it was held to be well settled that the possession of one tenant in common is the possession of all;[3] and this is the general rule.[4] The mere fact that one tenant in common goes away from the premises leaving his associates in possession creates no evidence of abandonment,

[1] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

[2] See Mallett v. Uncle Sam M. Co., 1 Nev. 188, 206; Davis v. Butler, 6 Cal. 510.

[3] Waring v. Crow, 11 Cal. 366.

[4] Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. Rep. 318; Mallett v. Uncle Sam M. Co., *supra*. See also dissenting opinion of McKee, J., in Tully v. Tully, 71 Cal. 338, 346, 12 Pac. Rep. 246, 249.

nor does his refusal to pay, or his delay in paying the expenses of the business, amount to an abandonment of the claim. Some proper action, authorized by statute, must be taken, or there must be clear and unequivocal proof of abandonment.

§ 515. Forfeiture defined.—The term "forfeiture," as used in the mining customs of California, and as now understood generally in mining law, means the loss of a right previously acquired in a mine or particular piece of ground by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated.[1] Likewise a failure to comply with the rules and requirements of the federal statutes requiring annual labor, or the local statute of the state in respect to the same, or respecting location work.[2]

[1] St. John v. Kidd, 26 Cal. 263.

[2] Niles v. Kennan (Mont.), 62 Pac. Rep. 360.

These rights were carefully considered by the supreme court of the United States in a case removed from the circuit court of appeals of the ninth circuit, and while the question involved was not one of annual labor, the rights of the miner were so clearly summarized by Mr. Justice Peckham, speaking for the court, that we take the liberty to reproduce excerpts from the opinion here:

"To sum up the character of the right which is granted by the United States to a locator, we find, first, that no written instrument is necessary to create it; locating upon the public land and continuing yearly to do the work provided for by the statute gives to and continues in the locator the right of possession, as stated in the statute.

"Second, this right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work, or if, being one among several locators, he neglects to pay his share for the work which has been done by his co-owners, his right and interest in the claim may be forfeited to such co-owners under the provisions of the statute.

"Third, his interest in the claim may also be forfeited by abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had. . . . If the locator remained in possession and failed to do the work provided for by the statute, his interest would

§ 516. Forfeiture pursuant to agreement or a statute—Strict construction required.— It is axiomatic that the law does not favor forfeitures and that they are abhorred in equity; and following this principle are others equally well settled, that where the forfeiture of an interest in a mining claim is claimed by another, the party asserting the forfeiture must himself be in the right. It is not enough that the person against whom it is claimed may not have performed all the conditions required by statute, or in some cases the agreement between the parties; but besides this, even if it exists, the party claiming the forfeiture must himself have performed all the requirements of the statute or agreement, as the case may be.[1]

§ 517. Forfeiture must be claimed and taken advantage of, but does not result from change of location or sale.— Generally, in order to make a forfeiture complete, as in case of a failure to do assessment work, there must be some person claiming the forfeiture and an interest in consequence thereof.[2] But a change of location is not an abandonment, nor will a forfeiture result from that alone;[3] but a defective sale has been construed to amount to an abandonment and a resulting forfeiture.[4] But the later and

terminate; and it appears to be equally plain that if he actually abandoned possession, giving up all claim to it and left the land, that all the right provided by the statute would terminate under such circumstances." Black v. Elkhorn M. Co., 163 U. S. 443, 450, 451; s. c., 52 Fed. Rep. 859, 3 C. C. A. 312. See also Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 426; Shepley v. Cowan, 91 U. S. 330.

[1] Wiseman v. McNulty, 25 Cal. 230. See also McGarrity v. Byington, 12 Cal. 426; Strang v. Ryan, 46 Cal. 33; Coleman v. Clements, 23 Cal. 245; Rush v. French, 1 Ariz. 146, 25 Pac. Rep. 918; Souter v. Maguire, 78 Cal. 543, 21 Pac. Rep. 183; Mallett v. Uncle Sam M. Co., 1 Nev. 188.

[2] Wiseman v. McNulty, 25 Cal. 230; Stone v. Geyser Q. M. Co., 52 Cal. 315; Pralus v. Pacific G. & S. M Co., 35 Cal. 30; Myers v. Spooner, 55 Cal. 257; Murley v. Ennis, 2 Colo. 300.

[3] Gleeson v. Martin White M. Co., 13 Nev. 442; Weill v. Lucerne M. Co., 11 Nev. 200; Erhardt v. Boaro, 113 U. S. 527; Niles v. Kennan (Mont.), 62 Pac. Rep. 360.

[4] Barkley v. Tieleke, 2 Mont. 59.

better doctrine by the same court, although not noticing the case just cited, takes what we deem a correct view of the law, and denies any such result as flowing from a sale defective because in fraud of creditors; in which case the decision was in favor of the execution purchaser. In this case it was claimed that a Colorado case opposed the final conclusion of the court,[1] but the court, after quoting from that case, say: "For the court holds that mining claims are rights which may be divested by sale, gift or abandonment;" and proceed to say: "This language is far from a statement that a sale is an abandonment, but is very strong in its implication that it is not." And further on in the same opinion the court dismissed this branch of the case with this forcible language: "It would be absurd to permit sales for the benefit of the vendees, and then declare such sales proof of abandonment of all rights of the grantor."[2]

ARTICLE B.

Forfeiture to Co-owners.

§ 520. Forfeiture to co-owners — The statute considered; likewise the notice — General observations.
521. Constitutional aspect of the question — Estate upon condition — Preliminary comments.
522. Same subject — Constitutional aspects further considered — The law of the land.
523. Same subject — Due process of law — Law of the land.
524. General observations as to miners' rights acquired by location — Whence flows the right to forfeit in any case — Its constituent elements.
525. Same subject — Duty of each co-owner to do or see to the doing of the annual labor — May not depend upon agreement of co-owner.
526. No contractual liability — It is the condition upon which the claim is held.
527. Relation of co-owners as to assessment work — Similar to estoppel and waiver — Conditions.
528. Who entitled to invoke the remedy — Must be co-owner when work done and when notice given.

[1] Derry v. Ross, 5 Colo. 295.

[2] Butte Hardware Co. v. Frank (Mont.), 65 Pac. Rep. 1.

§ 529. The doctrine of Turner v. Sawyer — The rights and duties of co-owners defined.
530. Only liable for legal assessment work.
531. Notice — Manner of making and serving.
532. Notice — To whom directed — Heirs and administrators — More than one year.
533. State statutory provisions as to annual labor.
534. State statutes as to proof of forfeiture — And herein of proof in general.
535. Summary — The doctrine of this article restated.

§ 520. Forfeiture to co-owners — The statute considered; likewise the notice — General observations. — Section 2324, Revised Statutes of the United States, so far as applicable to this branch of our inquiry, reads as follows: "Upon the failure of any one of several co-owners to contribute his portion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in a newspaper published nearest the claim, for at least once a week for ninety days, and if, after ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."[1]

Some of the states have enacted provisions as to the manner of giving notice, and also of the result of failure to contribute. Most of these are mere duplicates of the above provision of the federal statute, but as they are not within the authority given by the acts of congress to legislate upon the subject, they are of doubtful, if any, efficiency. It were better to leave the matter as congress has left it. There are some provisions, however, in the state statutes relative to recording the proof of giving the notice, and thus making the record title perfect, which are of course competent; these will be noticed hereafter. This

[1] R. S. U. S., § 2324.

statute of itself is no doubt competent and valid legislation, as it provides a notice to the delinquent, although at first blush it seems harsh; and the only question of doubt in the matter is the failure to provide the manner of giving notice to infants. It would seem, however, that congress had in view the possible, if we may not say probable, presumption that every infant having property interests of any kind would have a natural or legal guardian to look after such interests; and we apprehend that while there is no express provision therefor, personal notice to the guardian of such minor would be sufficient, as would also notice to the executor or administrator of the deceased person who was a delinquent co-owner.

§ 521. Constitutional aspect of the question — Estate upon condition — Preliminary comments.— The locator of a mining claim secures, as we have seen, merely an estate upon condition, and he loses such estate upon the happening of the condition, namely, the failure to do the requisite amount of work, by which alone he may enjoy his estate. This feature and branch of our subject, therefore, so far presents no constitutional question.

But the other branch of this inquiry, namely, the forfeiture by one co-owner to another, presents a striking feature of the law, which often produces the anomalous condition and effect of infants losing their property in some cases without any notice or process of law other than that provided in such a general way by the statute. If this provision of the statute were not so closely allied to the permission or condition extended by the government, by which alone it will part with its property, as to form a part of that condition, courts would undoubtedly hesitate before divesting infants of their property upon such a summary proceeding.[1]

Not to repeat too often, it is well known and fully demonstrated that the performance of annual labor is the condition upon which the miner holds his claim, and in the

[1] Elder, Adm'r, v. Horseshoe M. Co., 9 S. D. 636, 70 N. W. Rep. 1060.

exercise of complete justice the law gives to the co-owner performing the condition a summary remedy against the delinquent owner by personal notice, or advertisement of the fact of such performance, and a requirement of payment within ninety days after notice, under penalty of forfeiture.

The remedy is peculiar, statutory, and complete in itself; and, since the title is conditional and possessory merely, while the remedy is unique, it is just,[1] and extends to tunnel claims as well as all others.[2]

These proceedings, like application for patent, are essentially *in rem*. The law which bestows the right of property in the first instance attaches the conditions under which it may be held; and by the notice the forfeiting co-owner acquires dominion for want of the assertion of any superior right by the other party, or his representatives, over the property; he already has the possession. The only distinction between this and the cost-book rule in England is that here the delinquent co-owner loses the entire interest; there he only lost sufficient to satisfy the amount expended, which might or might not be the entire interest, according to the relative proportion of the amount expended to the value of the claim, the same as stock in corporations is lost by notice of assessment and sale of delinquent stock. The law does not permit the delinquent to speculate with his interest; he must pay up on it or lose it. He may not wait until it has enhanced in value and then claim it.[3]

§ 522. Same subject — Constitutional aspects further considered — The law of the land. — The great expounder of the constitution thus defines what is meant by the "law of the land:" "By the 'law of the land' is meant, clearly and intendedly, general law. A law which hears before it condemns; which proceeds upon inquiry and renders judg-

[1] Elder, Adm'r, v. Horseshoe M. Co., 9 S. D. 636, 70 N. W. Rep. 1060. See also Turner v. Sawyer, 150 U. S. 578; Johnston v. Standard M. Co., 148 U. S. 360.

[2] Com'r Williamson to John Hunter, Copp's Min. Lands, p. 222. See *post*, § 524.

[3] Johnston v. Standard M. Co., *supra*.

ment only after trial. And the meaning is, that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."[1]

Mr. Cooley cites this approvingly and says: "When the law of the land is spoken of, 'undoubtedly a pre-existing rule of conduct' is intended, 'not an *ex post facto* rescript or decree made for the occasion. The design' is 'to exclude arbitrary power from every branch of the government, and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute.' There are, nevertheless, many cases in which the title to property may pass from one person to another without the intervention of judicial proceedings, properly so called; and in the preceding pages it has been shown that special legislative acts designed to accomplish the like end are allowable in some cases. The necessity for 'general rules,' therefore, is not such as to preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power; nor is there any requirement of judicial action which demands that in every case the parties interested shall have a hearing in court."[2]

It is generally sufficient, if the statutory provision is universal in its operation, and intended wholly with reference to the future, so that every man has his property protected or his cause adjudicated under the same provisions or forms of the law as does his neighbor.[3]

§ 523. Same subject — Due process of law — Law of the land.— By due process of law is generally meant a law enacted in advance, universal in its operation as to all who

[1] Argument of Mr. Daniel Webster in Dartmouth College v. Woodward, 4 Wheat. 519. See also Cooley, Const. Lim., p. 431.

[2] Cooley, Const. Lim., pp. 432, 433. See also Wynehamer v. People, 13 N. Y. 378.

[3] Cooley, Const. Lim., p. 433.

come within the terms of its provisions, and by which notice of all proceedings is secured to the parties interested. The citations in the notes to the last preceding section apply equally to this definition. To be valid they must "proceed upon inquiry and render judgment after trial." The questions, then, for determination are whether it is "due process" or not, and not considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen. "When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by forms that pertain to rules of procedure merely."[1]

"Due process of law" means such an exertion of the powers of the government as the settled maxims of the law permit and sanction.[2] It constitutes notice to a person of proceedings against him, and a right to be heard in his own behalf. And because laws in individual cases work hardship, is no criterion that they lack elements of due process of law. But a proceeding where one's property is summarily disposed of, is, as to parties having no notice, not due process of law.[3] The constitutionality of a statute, then, broadly speaking, and especially with reference to a statute such as the one under discussion, is made to depend mainly upon the question as to whether it gives notice, and

[1] Cooley, Const. Lim., p. 434. See Bank of Columbia v. Okely, 4 Wheat. 234; Hurtado v. California, 110 U. S. 516.

[2] Desty, Fed. Const., p. 62; Beatholf v. O'Rieley, 18 Am. Law Reg. 119; Ex parte Ah Fook, 49 Cal. 402.

[3] Desty, Fed. Const., p. 321; Gilmore v. Sapp, 100 Ill. 297; Kelly v. Pittsburgh, 104 U. S. 78; In re Ludwigson, 3 Woods, 13.

an opportunity to be heard or to avoid the consequences sought by the proceedings in question.

§ 524. General observations as to miners' rights acquired by location — Whence flows the right to forfeit in any case — Its constituent elements.— Before taking up the question further as to the relation of one co-owner to another with reference to assessment work, it is proper at this time to digress for a moment and consider the principles upon which the mining right in the concrete is based. We have attempted to demonstrate that the right acquired is one upon condition, and that the condition is the performance of annual labor, and that the rights flowing from that condition, from the most obvious principles of natural justice, ought to inure to the person or persons performing the condition by which alone the estate may be preserved. Since the intent may be judged by the act in all cases, it is not unreasonable to assume that where a co-owner fails to see that the proper annual labor is performed, he does so intentionally, and thus manifests a purpose to abandon his claim and his interest therein.

Suppose a man owns a claim alone. He is bound to perform during each year the labor required by the statute, or it is forfeited without notice. Suppose he dies: the heir is entitled to no more time nor to any notice to prevent a forfeiture; he must at his peril fulfill the condition, namely, do the work, or make the improvements required by statute, in order to save it from forfeiture. For the same reason, otherwise stated, the person who may lawfully perform the condition — the co-owner under the statute — when he has performed this condition, should be, and is by the statute, subrogated to the rights of the delinquent upon advertising the fact, and giving an opportunity to discharge the burden which the law casts upon the property.[1]

[1] See *ante*, §§ 515, 521. See also Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 426; Shepley v. Cowan, 91 U. S. 330; Black v. Elkhorn M. Co., 163 U. S. 443.

§ 525. Same subject — Duty of each co-owner to do or see to the doing of the annual labor — May not depend upon agreement of co-owner. — It thus becomes manifest that it is the duty of every co-owner to see that the assessment work or annual labor is done upon his claim. He may not wait expecting that his co-owners will do it; he may not even depend upon their agreement to do so, unless one or more of them should agree to do so and fail for the purpose of relocating, which of course would alter their positions. Nor does the relationship of tenants in common impose upon any one of the co-tenants the duty to protect the common property. As to mining property, while they are co-tenants they deal at arm's length, and neither has the right to expect his co-owner will protect his interest for him; he must protect it himself. Thus, in an early case in Montana it was said: "The fact that these parties were tenants in common does not affect the question of representation. Mining claims so owned must be represented as if owned by one person. Representation is a unity. The co-owners may cause representative work to be done on the claim according to their respective interests, but when completed it must amount to one whole representation, otherwise the claim is not protected from relocation. Any co-owner or co-tenant may represent the claim and compel those interested with him to bear their portion of the expense, but the claim must be represented. And the agreement of a co-tenant to bear his proportionate share of the expense is not a representation and does not relieve him from the consequence of a failure to represent."[1] Before, however, a claim of forfeiture can successfully be made, the co-owner must be in default and must have actually failed to perform labor for himself or to contribute to that done by his co-owner.[2]

[1] Sanders v. Mackey, 5 Mont. 523, 6 Pac. Rep. 361; Doherty v. Morris, 11 Colo. 12, 16 Pac. Rep. 911.

[2] Brundy v. Mayfield, 15 Mont. 201, 38 Pac. Rep. 1067.

§ 526. No contractual liability — It is the condition upon which the claim is held.— Since the performance of annual labor alone constitutes the condition upon which mining claims may be held, and since this rule applies equally in the concrete where it is referable to the entire claim, as it does in the abstract where it is referable to the duty which each co-owner owes to all others performing the labor, and since the rule is well settled that where the right and the remedy are both creatures of the statute the remedy pointed out by statute is exclusive,[1] it would seem to follow as a necessary corollary that the remedy pointed out by statute in this particular case is exclusive, and that there can be no express or implied liability to respond in any other way for annual labor than by forfeiture of the claim; and in all cases the conduct of the parties must receive a strict construction, and the facts to support the claimed forfeiture must be plain and not left to inference.[2] While a mine owner may hire a stranger to perform assessment work upon the claim for himself or for his co-owners, and he will be liable as upon an express or implied contract, as the case may be, for the amount and value of labor performed, yet the rule is different with reference to his co-owners in the absence of an express contract. As to them it is well settled that the liability can only be enforced against their specific interests by advertisement in the manner pointed out by statute. In other words, there is no contractual or personal liability, but merely a statutory one, for which the property may be taken in satisfaction.[3]

[1] See Jacob's Fisher's Digest, tit. "Remedy;" Cooley on Torts, p. 651; Enright v. Grant, 5 Utah, 334, 341, 15 Pac. Rep. 268.

[2] Von Schmidt v. Huntington, 1 Cal. 55; McKnight v. Kreutz, 51 Pa. St. 232; Wiseman v. McNulty, 25 Cal. 230.

[3] Brundy v. Mayfield, 15 Mont. 201, 38 Pac. Rep. 1067; Turner v. Sawyer, 150 U. S. 578; Billings v. Aspen M. & S. Co., 2 C. C. A. 252, 51 Fed. Rep. 338; affirmed, s. c. on rehearing, 3 C. C. A. 69, 52 Fed. Rep. 250; Elder v. Horseshoe M. Co., 9 S. Dak. 636, 70 N. W. Rep. 1060; Royston v. Miller, 76 Fed. Rep. 50; Sanders v. Mackey, 5 Mont. 523, 6 Pac. Rep. 631.

§ 527. Relation of co-owners as to assessment work — Similar to estoppel and waiver — Conditions.— By paying his quota of the amount stipulated by the laws of congress, and by performing the condition upon which he holds his property, the miner is fully protected in its enjoyment. His failure to do this amounts logically to a waiver of his rights, and he is thereafter estopped to further assert his claim to an interest in the property.[1] This is but the exercise of a natural right, and, if borne in mind, will tend to explain many difficulties.[2]

The supreme court of South Dakota state the doctrine of conditional estates, and the relationship of co-owners to each other, in language clear and explicit, and while some of the matters were proper for a preceding section, it is not out of place to reproduce them here: "It follows, therefore," says the court, "that the locator, his heirs or assigns, must see that the condition is performed, in order that their right to the possession may continue. When the location is made by two or more, they become co-owners, and one or more of the co-owners may do the required work upon the claim and thus perform the condition, and thereby continue the right of themselves and co-owners to the exclusive possession of the claim. But no duty is imposed upon any one co-owner to do this. If the work is done, however, by one or more, the law requires the other co-owner or co-owners to contribute his or their share of the required expense, and upon failure so to do his or their interest becomes the property of those performing the work, upon compliance with the requirement of the statute, which is the giving 'such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim.'

[1] Gleeson v. Martin White M. Co., 13 Nev. 442, 469; Elder v. Horseshoe M. Co., 9 S. Dak. 636, 70 N. W. Rep. 1036; Snell v. Levitt, 110 N. Y. 595, 18 N. E. Rep. 370.

[2] Black v. Elkhorn M. Co., 163 U. S. 443, 451; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428; Collins v. Bartlett, 44 Cal. 371; Commonwealth v. Alger, 7 Cush. 84; Steel v. Smelting Co., 106 U. S. 447.

The statute makes no specific provision for any address or heading to the notice."[1]

§ 528. Who entitled to invoke the remedy — Must be co-owner when work done and when notice given.— The plain reading of the statute leaves little or nothing to be said, and little room for discussion or construction as to who may claim the benefits, and who may be rendered liable for the performance of annual assessment work upon a mining claim. The statute says, "the co-owner who has performed the labor may give such delinquent co-owner notice," etc. It will thus be seen that the remedy is peculiar and statutory, and the right to exercise it is conferred solely upon the co-owner who did the work; he alone may exercise it. This means not only a co-owner when the work was done, but likewise when the remedy is invoked.[2]

It is also apparent that the remedy, being personal to the co-owner who did the work, is not assignable and may be exercised only by such person.[3] The statute seems to require, in positive terms, that the notice must be given by the person who performed the labor to the person liable therefor at the time it was done; and while, as we have observed, the person performing the labor may not assign the claim even by the transfer of interest so as to authorize the assignee to give the notice of forfeiture and exercise the rights thereunder, the same rule does not apply to the person against whom the notice runs. In other words, this is a liability attaching to the interest itself, and is not defeated by transferring the interest. But he who takes it, takes it with that burden impressed upon it.[4] And it would seem to follow that it could make no difference how the transfers were made, or how many were made; the successor in in-

[1] Elder v. Horseshoe M. Co., *infra.*

[2] Turner v. Sawyer, 150 U. S. 578; Brundy v. Mayfield, 15 Mont. 201, 38 Pac. Rep. 167; Elder v. Horseshoe M. Co., 9 S. Dak. 636, 70 N. W. Rep. 1036, 63 Am. St. Rep. 895; R. S. U. S., § 2324. See also Royston v. Miller, 76 Fed. Rep. 50.

[3] Turner v. Sawyer, *supra;* Brundy v. Mayfield, *supra.*

[4] Elder v. Horseshoe M. Co., *supra.*

terest would take it impressed with this burden and liability, and be bound to discharge it.

A nice question might naturally arise as to whether this right would descend to the heirs of the co-owner who did the work. From the plain letter and reading of the statute it would seem that it would not, and yet the point has never been decided; and it must be admitted that exactly the same reasons which exist for denying the right of assignment do not exist with reference to the rights acquired by an heir. If it is not assignable, it is because it is a personal privilege which may be exercised or waived by the person in whose favor it runs — the co-owner who did the work,— and because the statute expressly restricts it to such co-owner. But there is this distinction between the attempt to assign and the assertion of the right by the assignee on the one hand, and the assertion of the right by an heir on the other: the assignment of the assessment work, together with the grant of the claim, or without it, would be a voluntary act; while paying the debt of nature is not such in that sense.

Much could be said upon both sides of this question, but probably the safer rule is to follow the strict letter of the statute and hold the right to be a personal privilege, to be exercised alone by the co-owner who did the work. As was said by the supreme court of the United States: "It will be observed that the right to give this notice of a claim for contribution is limited to the co-owner who has performed the labor."[1]

§ 529. The doctrine of Turner v. Sawyer — The rights and duties of co-owners defined.— One of the most instructive cases upon this subject arose in Colorado, whence it was carried to the supreme court of the United States by appeal. It arose out of this state of facts: The claim was owned as follows: Amos Sawyer one-half, Sanderson three-eighths, Finch one-eighth. Later Amos Sawyer con-

[1] Turner v. Sawyer, 150 U. S. 578.

veyed one-quarter to A. G. Sawyer, who also became possessed of the Finch interest; this was in November, 1886. In the meantime one Teal filed a lien for annual labor done at the request of Sanderson and Amos Sawyer for $148.10, and one Christianson also filed a similar notice of lien. In 1884 Teal instituted a suit to enforce his lien, and made Sanderson, Marks, Finch, P. F. Smith and ——— Sawyer parties as the owners thereof. There was no service upon Sawyer and he was not in court; on June 2, 1884, Teal proceeded to sell the interest of Sanderson, Marks, Finch and P. F. Smith, to pay the amount of his decree, at which sale White became the purchaser, and afterwards assigned his certificate of purchase to Turner, who obtained a sheriff's deed for the property on the 3d of March, 1885. This deed purported to convey the entire lode in controversy. Christianson instituted suit against the same defendants as in the Teal suit, which was pending at the time, to enforce his lien against the same property; on April 24, 1885, Turner, who had done the annual labor on the claim for 1884, before he obtained the sheriff's deed, published a forfeiture notice against appellee, plaintiff Alfred A. G. Sawyer, under the provisions of the act of congress, but no notice was published against Finch, who still owned an undivided one-eighth of the lode, nor against Amos Sawyer, who owned one-half of the lode. During the year 1884 and until January, 1885, appellant Turner declined an offer to pay five-eighths of the annual labor for the year 1884 on behalf of L. E. Finch and Amos Sawyer, on the ground that the record showed one Sanderson and Sawyer as having no remaining interest; on October 27, 1885, Turner filed in the office of the clerk and recorder of the county where the property was situated, an affidavit that A. G. Sawyer, the appellee, had wholly failed to comply with the demands contained in the forfeiture notice. Subsequently, about November 1st, Turner instituted proceedings in the United States land office at Central City, Colorado, for the purpose of perfecting a patent for the lode in his own name, and on April 13, 1886, a re-

ceiver's receipt was issued to him by the receiver of the land office acknowledging payment in full for the entire lode; and on April 20 he conveyed an undivided one-fourth interest to George E. McClelland, by deed recorded December 6, 1886, and another undivided one-fourth to one J. S. Allison, by deed recorded May 19, 1886. On March 17, 1887, the appellee, Sawyer, filed this bill charging the patent to have been procured to the appellant, Turner, by false and fraudulent representations as to ownership, and praying that the title to an undivided five-eighths of the lode be decreed to belong to the appellee, and that Turner convey the same to him.

Upon the hearing in the court below it was found that at the time Turner applied for the patent and received the receipt therefor he was not the legal owner of an undivided five-eighths of such lode, and it was decreed that he convey the same to appellee Sawyer, and the other defendants were enjoined from interfering. From this decree an appeal was taken to the supreme court of the United States by Turner and McClelland.

The court, speaking through Mr. Justice Brown, after noticing that Sawyer was not made a party to the Teal suit, and consequently that Teal acquired no rights as against Sawyer under his decree and sale, proceeded to say: "It remains then to consider whether Turner acquired such interest by the publication of his forfeiture notice against Sawyer for the annual labor of 1884. The notice was as follows:

"'To A. A. K. Sawyer, residence unknown:

"'You are hereby notified that I have performed the annual labor required by law for the year 1884, upon the Wallace lode, situated in Cascade mining district, Clear Creek county, Colorado. And that unless in the time prescribed by law you pay your proportionate amount of said expenditure, your interest in said lode will be forfeited to me under the provisions of section twenty-three hundred and twenty-four of the Revised Statutes of the United States. Robert Turner.'"

This notice was published pursuant to that portion of section 2324 quoted in a previous section of this chapter. After observing this the court proceeds to say: "It will be observed that the right to give this notice for a claim for contribution is limited to a co-owner who has performed the labor. Turner was not a co-owner with Sawyer at any time during 1884, as Albert A. G. Sawyer did not receive his deed from Amos Sawyer until January 12, 1885, and Turner did not receive his deed from the sheriff until March 3, 1885. He did, however, hold an inchoate title by virtue of White's purchase at the execution sale of June 2, 1884, and the subsequent assignment August 25, 1884, of the sheriff's certificate to him. He appears also to have obtained the assignment of certain other judgments which had been recovered by William Hunter against Sanderson and Smith. These judgments were assigned to him August 27, 1884; the sale was made under them January 12, 1885, and certificates of sale issued to Turner, who thus became the purchaser under these judgments. Neither of these, however, made him a co-owner during the year 1884 within the meaning of the statute, which, providing as it does for the forfeiture of the rights of a co-owner, should be strictly construed."

After passing upon other questions as to the effect and extent of interest acquired under a certificate of sale, which are unnecessary to notice here, the court held that inasmuch as Turner had not acquired the interest of Sawyer nor of Finch by any of these proceedings, he therefore held the title as to five-eighths in trust for Sawyer, and the judgment of the lower court was affirmed.[1]

§ 530. Only liable for legal assessment work.—The remedy by forfeiture of the co-owner's interest, as we have already observed, is limited to the amount required by statute; and while the remedy is clear and positive as to that, the co-owner cannot be compelled to pay one penny more

[1] Turner v. Sawyer, 150 U. S. 580.

than the legal assessment work, that is, the amount required by congressional law, besides, of course, the cost of advertising in the proper case. His co-owner may expend any sum he chooses upon the claim, but he will not be compelled to contribute more than his share of the statutory sum. An eminent law writer and mining lawyer thus states the law: "Although one co-owner has expended more than enough to hold the claim, the delinquent co-owner, to save forfeiture under the act of congress, is only required to pay or tender his proportion of the amount which the law required to be expended upon the claim."[1] Thus it is that the right of the co-owner to recover any excess is dependent wholly upon contract, and can be enforced only in that way, and in such case the contract must first be proved.[2]

In a California case brought to partition a certain mining claim in Nevada, where the plaintiff and defendant were tenants in common for equal portions, the court ordered the sale of the land, and a dispute arose as to the division of the proceeds. The plaintiff claimed, out of the proceeds of the sale, moneys paid out authorized by defendant, for obtaining patent, besides assessment work, and the court held that the plaintiff was properly allowed such sums, the first upon his contract, and the second upon his statutory liability, and a judgment was entered dividing the balance equally.[3]

§ 531. Notice — Manner of making and serving. — The statute seems to contemplate, and it is but following the general rule of law, that personal service of the notice is preferable, and should be made wherever practicable before resorting to constructive notice by publication in a newspaper. Of course, where more than one is served and personal notice is impossible or impracticable as to all, the plain

[1] Morr. Min. Rights (8th ed.), p. 77.

[2] Neuman v. Dreifurst, 9 Colo. 128, 11 Pac. Rep. 98; McCord v. Oakland Q. M. Co., 64 Cal. 134; Holbrooke v. Harrington (Cal., 1894), 36 Pac. Rep. 865.

[3] Holbrooke v. Harrington, *supra*.

authority of the statute is that notice may be served by publication. But the safer and better rule, while not the only one that would be legal, would require service personally whenever possible. Of course, by the plain reading of the statute, the service is complete when it is made personally upon the delinquent co-owner, or upon such legal representative as the law permits. As to notice by publication, the service is complete ninety days after the first publication of the notice.[1] Of course, it goes without saying that a notice of forfeiture is inoperative in any case when the facts upon which it is based are untrue, or where the federal statute excuses the performance of annual labor.[2]

§ 532. Notice — To whom directed — Heirs and administrators — More than one year.— Nearly all of the cases involving forfeiture of co-owners for annual labor have turned upon the sufficiency of the notice, or the competency of the person giving the notice. Thus, in one case, as we have seen, the notice to Sawyer by a person who was not at the time a co-owner was correctly held insufficient.[3] But in practice it is a very common thing to direct the notice to the last known co-owner who co-operated with the co-owner giving the notice in working the claim, or to the person who was last known to him to be the owner of the interest; and in such case it would hardly seem necessary that he should, at his peril, either search the record and determine who was the owner, or who were the lawful assigns or heirs of such owner. It is sufficient that he direct it to the person last known by him to own the interest, specifically, with the additional direction generally to the heirs or assigns of such person.[4] As was said by the Dakota court in the

[1] Turner v. Sawyer, 150 U. S. 578; Billings v. Aspen M. Co., 2 C. C. A. 252, 51 Fed. Rep. 358; affirmed, 8 C. C. A. 69, 52 Fed. Rep. 250; Brundy v. Mayfield, 15 Mont. 201, 38 Pac. Rep. 1067; Copp, Min. Lands, p. 222; Re Grampion Lode, 1 L. D. 544; Hussey Lode, 5 L. D. 98.

[2] Royston v. Miller, 76 Fed. Rep. 50; Brundy v. Mayfield, *supra*.

[3] Turner v. Sawyer, *supra*.

[4] Elder v. Horseshoe M. Co., 9 S. Dak. 636, 70 N. W. Rep. 1060.

case just cited: "The other objections made to the admission of the published notice, it seems to us, do not merit very much consideration. The objection that the heirs are not individually named in the notice cannot be sustained. To require the co-owner to ascertain, at his peril, the names of all the heirs of delinquent co-owners, would be to impose upon him a burden the law never intended should be imposed, and one that could be of no possible benefit to any one, as the heirs, if personally named, would be no more likely to obtain actual notice than when named simply as heirs. Neither do we think there is any merit in the objection that in the notice the expenditure for eight years is included. Certainly, if the parties interested intended to pay, and thus protect their interest in the claim, they would be greatly benefited by grouping them all in one notice. If they did not intend to pay, the grouping would be immaterial to them. The law does not prohibit it, and we can discover no valid reason why it should not be done. The objection that the notice was fatally defective because addressed to Rufus Wilsey and administrators, as well as heirs, and to all whom it might concern, is not tenable. It was one method of designating by whom the claim was located. Perhaps a notice addressed to the heirs of Rufus Wilsey, deceased, would have been more technically correct; but we think the form is not material, so long as the statute is substantially complied with. The insertion of the administrator could do no harm, even if there was none."[1]

§ 533. State statutory provisions as to annual labor.— Many of the states and territories have enacted statutes in imitation and in the exact language of the federal statute upon this subject, as well as on others. These statutes will be found at length in the Appendix, and it is therefore unnecessary to reproduce their provisions here. It is sufficient to observe with reference to them that they are supererogatory to say the least, and are of doubtful efficacy

[1] Elder v. Horseshoe M. Co., 9 S. Dak. 636.

in any case for want of power. A power not conferred is withheld. And legislation upon subjects by congress which are peculiarly within its exclusive authority must be held, as a general rule, to exhaust the power and leave nothing for further enactment by state legislatures.[1] Congress authorized state legislatures and the miners of the district to enact certain laws relative to the manner of locating and recording claims; it therefore and thereby withheld all other power.[2] Besides, this is a power delegated to congress, and could only be redelegated within very narrow limits. The authority of congress over the territory and property of the United States is specially reserved by the federal constitution,[3] and does not exist elsewhere.

§ 534. State statutes as to proof of forfeiture — And herein of proof in general.— Several of the states within the mining region have enacted statutes providing for recording of proof of notice to the delinquent co-owner — either the proof of publication or the proof of personal service,— and providing that the recording of such proof shall have the effect to vest the delinquent co-owners' interest in the mine in the person or persons who performed the labor and gave the notice. Some such statutory provision would be entirely proper, but it is sufficient to observe with reference to any such statutes as we have indicated — that of California, for example — that it is incomplete in that it does not provide for proof that the amount claimed has not been paid after the giving of the notice and before recording the proof of service or of publication, as the case may be.

The correct practice in all such cases would be to file the

[1] Black v. Elkhorn M. Co., 163 U. S. 145; Camfield v. United States, 167 U. S. 520; United States v. Jones, 109 U. S. 513; Bonaparte v. Baltimore, 104 U. S. 592; Ex parte Brennan, Crabbe, 456, Fed. Cas. No. 1,880.

[2] R. S. U. S., § 2324; Sutherland, Stat. Const., § 378; State ex rel. Pub. Co. v. Hogan (Mont.), 56 Pac. Rep. 818; Story, Const., § 451.

[3] Const. U. S., art. I, § 8; Wilcox v. Jackson, 13 Pet. 516. See *ante*, § 520.

proof of service, attached to the copy of the notice, ninety days after the service thereof, or a proof of publication of the printed notice, as the case may be, six months after the first publication thereof, with the affidavit of the forfeiture claimant that the amount has not been paid in the meantime by the person against whom the notice is directed, or by any other person for him, with the recorder of deeds in the county in which the property is situated. When this is properly done it should be held to have the effect of vesting the delinquent co-owner's interest in the person giving the notice.

§ 535. Summary — The doctrine of this article restated. — To briefly summarize the principles enunciated in the foregoing sections, we are justified in deducing the following conclusions therefrom:

Congress has provided a complete and summary remedy whereby a co-owner who fails to perform the annual labor required upon the claim, which is the condition upon which the claim is held, forfeits his interest in the claim to the co-owner who did the work, upon such co-owner claiming the forfeiture and giving the notice required by statute.

That the law is not only constitutional, but is absolutely just, when considered in all its environments.

That the right is a personal one and must be given by the co-owner who did the work, to the delinquent co-owner, his legal representatives, heirs or assigns; and that this means a co-owner not only when the work was done, but when the notice was given.

That the form of the notice is not material. Neither is it material to whom it is directed, provided the latter be at one time the owner of the interest, and provided also that it can be legitimately and fairly gathered from the notice: (*a*) the fact of work, (*b*) the amount thereof, (*c*) the year for which it is claimed, (*d*) the person who did the work, and that he was and still is a co-owner, (*e*) that the person to whom it was directed was at one time an owner, and the

further comprehensive statement including his heirs, legal representatives or assigns.

That state statutes requiring additional work of a particular kind are without authority and void; but that reasonable state statutory requirements as to recording the proof of forfeiture are entirely competent and proper.

ARTICLE C.

Of Forfeiture to the United States.

§ 540. Abandonment to the United States — Special definition.
541. Definition here.
542. Of the general doctrine of abandonment and forfeiture thereby.
543. Act and intent — Question for the jury.
544. Same — Forfeiture is not favored.
545. Presumptions of duty done — Law and acts of claim owner construed against forfeiture.
546. Law must in general be complied with.
547. Cancellation of entry does not restore mineral lands to the public domain.

§ 540. Abandonment to the United States — Special definition.— We have attempted to demonstrate in the preceding sections that abandonment and forfeiture are sometimes synonymous. They are so when they describe the result whereby a mining claim, once owned, claimed and operated by a person, is lost to him by failure to perform the condition under which it is held, that is, to do the annual labor as required by law.[1] If a person fails to do the assessment work, his claim is forfeited upon another coming in and making a relocation. If he abandons it and goes away, it also becomes public property, and, in either event, is open to the next comer. As was said by the supreme court of Arizona: "Abandonment has always rested in intention as

[1] Kramer v. Settle, 1 Idaho, 485, 9 M. R. 561; Kinney v. Fleming (Ariz.), 56 Pac. Rep. 723; Carney v. Arizona G. M. Co., 65 Cal. 40; Du Prat v. James, 65 Cal. 555, 4 Pac. Rep. 562; Russell v. Brosseau, 65 Cal. 605, 4 Pac. Rep. 643; McCormick v. Baldwin, 104 Cal. 227, 37 Pac. Rep. 903. See also § 524, *ante*; *post*, § 542. For New Mexico statute on abandonment, see Appendix "B," § 63, New Mexico note.

well as in acts accompanying the intention. . . . Yet if, after putting up the initial monument and examining the claim, he wishes to abandon it, and does tear down the monument and go away with the intention of not going back, and in fact pays no further attention to the claim, the land covered by the claim is open to location the moment such act takes place and such intention is formed."[1]

§ 541. **Definition here.**— Proceeding further in the same direction, it is sufficient to observe that specially, and for the purposes of this article, abandonment is the loss of property by the voluntary act of a person, while forfeiture is the loss by abandonment, or by the involuntary act of the owner, regardless of his intention.[2]

§ 542. **Of the general doctrine of abandonment and forfeiture thereby.**— The question of forfeiture by operation of law, namely, the omission to perform the annual labor, or to contribute to the co-owner who did perform it, has been fully considered, and the loss of the property in either case cannot be questioned or afterwards disputed either by the person himself or by any one in privity with him. We have likewise noticed that other species of forfeiture by abandonment, where the owner voluntarily surrenders his title and claim, and departs therefrom without any intention of ever reclaiming it, but, on the contrary, with the fixed intention not to do so. His intention being demonstrated by his act, and in many cases by actual words of mouth, is considered in the cases as conclusive upon him, and he is estopped from asserting a contrary intention where adverse rights have grown up pursuant thereto and in consonance therewith.[3] In the case just mentioned the voluntary abandonment, upon the property being claimed by another, is

[1] Kinney v. Fleming, *infra*.

[2] Wiseman v. McNulty, 25 Cal. 230; Waring v. Crow, 11 Cal. 366; Mallett v. Uncle Sam M. Co., 1 Nev. 188; Oreamuno v. Same, 1 id. 215; St. John v. Kidd, 26 Cal. 263; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361.

[3] Kinney v. Fleming (Ariz.), 56 Pac. Rep. 733; Richardson v. Mc-

just as effective and the loss is just as complete to the original claimant as in the case of an involuntary forfeiture. Thus,—

§ 543. Act and intent — Question for the jury.— As we have seen,[1] forfeiture, or loss by abandonment, requires a union, or joint operation, of act and intent, and is generally a question of fact. But the mere act of the owners in going upon a mining claim and announcing to each other that it is their intention to abandon it, and that they do thereby abandon, whereupon they immediately, without leaving the ground, attempt a relocation in the name of a third person, not present or taking any part, does not constitute an abandonment of the claim; and a relocation so made is invalid for the reason that the ground was not at that time open to relocation.[2]

§ 544. Same — Forfeiture is not favored.— Since it is axiomatic that forfeitures are odious to the law, and for that reason are not countenanced or favored by the courts, all doubtful cases will be construed against the forfeiture.[3] But while this is true, the law exacts a faithful compliance with the conditions required.[4] Yet the burden of proving a forfeiture falls upon the person alleging it,[5] and it is always a question of fact for the jury whether a mining claim had been abandoned or forfeited prior to relocation.[6]

Nulty, 24 Cal. 239; St. John v. Kidd, 36 Cal. 263; Keane v. Canovan, 21 Cal. 291; Davis v. Purley, 30 Cal. 630; Willson v. Cleaveland, id. 192; Dougherty v. Creary, id. 290; Davis v. Butler, 6 Cal. 510; Davis v. Gale, 32 Cal. 26; Smith v. Cushing, 41 Cal. 97; Stone v. Geyser Q. M. Co., 52 Cal. 315; Richards v. Dower, 81 Cal. 44, 22 Pac. Rep. 304; Seymour v. Wood, 58 Cal. 303; Mallett v. Uncle Sam M. Co., 1 Nev. 188; Derry v. Ross, 5 Colo. 295.

[1] See *ante*, §§ 510, 511, 512.

[2] McCann v. McMillan, 129 Cal. 350, 62 Pac. Rep. 81.

[3] Hammer v. Garfield M. Co., 130 U. S. 291.

[4] United States v. Iron Silver M. Co., 129 U. S. 673.

[5] Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 183; Dibble v. Castle Chief M. Co., 9 S. Dak. 618, 70 N. W. Rep. 1055.

[6] Taylor v. Middleton, 67 Cal. 656, 8 Pac. Rep. 594.

§ 545. Presumptions of duty done — Law and acts of claim owners construed against forfeiture.— Since it is popularly believed that most men obey the law — at least the law and the courts say so,— there is, following the same line of thought as applied to the performance of annual labor on a mining claim, a presumption in favor of duty done and of compliance with the law. That presumption stands in favor of the holder of the location until it is overcome by proof.[1] Agreeably to these presumptions, it has been held that one in actual possession of a mining claim and developing the same, even though the boundaries are not distinctly marked on the ground, has not forfeited it;[2] nor if he is wrongfully driven away from the claim.[3] Nor will the mere fact that a sheriff's sale of the property has been made under the older location, alone constitute proof of forfeiture, in the absence of proof of delivery of the sheriff's deed.[4] As we have seen, conveyance to an alien is not a forfeiture of a claim, the alien being allowed to hold until office found.[5] And the finding of the jury that the work barely reaches the required amount to save from forfeiture will not be disturbed.[6] The cases, in short, demonstrate that while the requirement is positive that work be done, and that the full amount must be done, in a doubtful case the law is with the older location and in favor of holding it.

§ 546. Law must in general be complied with.— But while the presumption is always, as stated in the last section, strictly against forfeiture, yet the presumption only

[1] Hammer v. Garfield M. Co., 130 U. S. 291; Renshaw v. Switzer, 6 Mont. 464, 13 Pac. Rep. 127.

[2] Neubaumer v. Woodman, 89 Cal. 310, 26 Pac. Rep. 900. See also Erhardt v. Boaro, 113 U. S. 527.

[3] Utah M. Co. v. Dickert & M. S. Co., 6 Utah, 183, 21 Pac. Rep. 1002; Erhardt v. Boaro, *supra*.

[4] Manning v. Strehlow, 11 Colo. 451, 18 Pac. Rep. 625.

[5] Hirshler v. McKendricks, 16 Mont. 211, 40 Pac. Rep. 290.

[6] Id. See also Crown Point G. M. Co. v. Crismon (Oreg., 1901), 65 Pac. Rep. 87, where the court refused to disturb the finding of the lower court to the effect that sufficient work for the year in question had been performed.

stands in the absence of proof. It does not lessen in the slightest degree the absolute duty to comply with the law. In an early case in Nevada, a doctrine was stated which, the necessary changes and substitutions being made, applies with equal force to the law as it exists to-day. It was there held that the district mining laws govern the location and manner of developing mines, and where one directly points out how such mining claims, when once possessed and acquired, can be maintained, that course must be pursued, a failure to do so rendering such owner liable to forfeiture.[1] This, we take it, is the true rule, and is supported by the weight of authority. We do not mean by this that hair-splitting as to the amount of work necessary to be done will be tolerated, but substantial compliance with the statute will be required, and, as previously stated,[2] any neglect or failure on the part of one or more co-tenants to do the annual assessment work required by law will not excuse the other co-owners from performance, nor exempt them from forfeiture for a failure to perform or have it performed.[3] And it is immaterial whether there was a conspiracy or not, provided the conspiracy is not traced to the relocator; and this forfeiture may be claimed even after an application for patent, where the work is not kept up after the application, pending the issuance of the receiver's receipt.[4]

§ 547. Cancellation of entry does not restore mineral land to the public domain.— It was formerly thought, and so held by the land department, that the cancellation of a mineral entry had the effect to restore the land to the public domain of the United States and render it open to relocation.[5] But since the decision in such cases goes only to the extent that upon the showing made, resulting from defects in the title too numerous to mention, the applicant is

[1] Mallett v. Uncle Sam M. Co., 1 Nev. 188.

[2] *Ante*, § 494.

[3] Doherty v. Morris, 18 Colo. 105, 28 Pac. Rep. 85.

[4] South End M. Co. v. Tinney, 22 Nev. 19, 35 Pac. Rep. 89; *ante*, § 493.

[5] Re Ophelia Pope Lode, 9 C. L. O. 192.

not entitled to a patent, such a position is untenable, and the land department, by its later rulings, holds to the contrary.[1] In its last expression upon the subject that we have been able to find occurs the following correct statement of the law: "The fact that the entry was canceled would not, of itself, render the ground subject to relocation. The original location of the lode was not affected by the cancellation, even though it had been regular (irregular?), and the owner could still hold it under its possessory right so long as there was a compliance with the requirements of the law."[2]

ARTICLE D.

Forfeiture and Abandonment of Tunnel Claims.

§ 551. Abandonment and forfeiture of tunnel claims — Why treated here.
552. Hazardous undertaking should reap some reward.
553. Diligence and good faith required.
554. Wide margin between abandonment and reasonable diligence.
555. Abandonment and forfeiture of a tunnel controlled by general rules.
556. Forfeiture under the special six months' rules.

§ 551. Abandonment and forfeiture of tunnel claims — Why treated here.— While in some respects the manner of holding tunnel claims is the same as lode claims, except that the grant is more extensive, and a correspondingly higher duty in the manner of working the same is imposed upon the locator and owner, the mode of forfeiture by abandonment more nearly resembles the general question, and is therefore properly treated here. This grant, as we have observed, is a sweeping one, and it is unfortunate that the legislative power has not been more specific in respect to the nature and extent of the grant, and more positive and exacting in respect to the nature, quantity and character of work necessary to protect the same from forfeiture. The

[1] Branagan v. Dulaney, 2 L. D. 744; McGowan v. Alps Cons. M. Co., 21 L. D. 113.

[2] McGowan v. Alps Cons. M. Co., *supra*, p. 115.

language of the supreme court of the United States, while fully comprehending and describing the extensiveness of the grant, is less positive as to the diligence required to hold the grant than we could wish, but perhaps as positive as the law itself will warrant; nevertheless, the words used are accurate in describing the nature of the grant, and we therefore reproduce them. "It may be true, as counsel claim, that this construction of the statute (construing the tunnel location as a reservation) gives the tunnel excavator some advantages. Surely it is not strange that congress deemed it wise to offer some inducements for running a tunnel into the side of a mountain. At the same time it placed specific limitations on the rights which the tunnel owner could acquire. He could acquire no vein which had theretofore been discovered from the surface. His right reached only to blind veins, as they may be called, veins not known to exist, and not discovered from the surface before the commencement of his tunnel. It required reasonable diligence in the prosecution of his work. It placed a limit in length — three thousand feet,— beyond which he might not go in his search for veins, and acquire any rights under his tunnel location, and the veins to which he might acquire any rights were those which the tunnel itself crossed."[1]

§ 552. Hazardous undertaking should reap some reward.— It has always been recognized by the courts, as it has been found true in actual experience, that the driving of a tunnel into a mountain side for the discovery and development of blind lodes is a hazardous undertaking, and doubtless this furnishes the excuse, to a very great extent, for the extensiveness of the grant. Said the circuit court of appeals in a recent case: "The labor, expense and risk of loss in the discovery and development of such veins from the surface are light indeed in comparison to those required

[1] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 110. To the same effect, see Campbell v. Ellet, 167 U. S. 116; s. c. below, *sub nom.* Ellet v Campbell, 18 Colo. 510, 33 Pac. Rep. 521.

upon a tunnel that is run to discover unknown veins. The work of driving such a tunnel thousands of feet into the side of the mountain, for the purpose of discovering a vein or lode that is not known to exist at all is an extremely hazardous and expensive undertaking. This is common knowledge, and congress must be taken to have had this knowledge when they enacted this law. They must have known that such a hazardous enterprise was not likely to be undertaken unless rewards commensurate with the risk and expense were offered."[1]

§ 553. Diligence and good faith required.—The law specifies no particular amount of labor upon a tunnel claim each year, but the spirit as well as the letter of the law requires the utmost diligence and good faith.[2] The reservation only applies and inures to the benefit of the tunnel claimant in consequence of this diligence and good faith. As was said by the supreme court of Montana: "The fact that said non-action on the part of the tunnel claimant should constitute an abandonment shows that it was the intention of congress to reserve such lodes from the commencement of the tunnel, while it (work) was prosecuted according to law."[3]

Thus, the very conditions upon which the tunnel right is held are the commencement of work upon the tunnel and prosecuting the same with reasonable diligence.[4] Whence it follows, from the very nature of the thing, that anything short of a strict compliance with the statute must be construed as an abandonment.

[1] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200, 13 C. C. A. 390. See also Hope M. Co. v. Brown, 11 Mont. 370, 28 Pac. Rep. 732; Glacier Mt. M. Co. v. Willis, 127 U. S. 471; Back v. Sierra Nevada M. Co., 2 Idaho, 386, 17 Pac. Rep. 83.

[2] R. S. U. S., § 2323.

[3] Hope M. Co. v. Brown, 11 Mont. 370, 28 Pac. Rep. 732.

[4] Corning Tunnel, etc. Co. v. Pell, 4 Colo. 507; Glacier Mt. M. Co. v. Willis, 127 U. S. 471; Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 110; Campbell v. Ellet, id. 116; Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200, 13 C. C. A. 390.

§ 554. Wide margin between abandonment and reasonable diligence.— In the last case cited in the preceding section the circuit court of appeals of the eighth circuit considered this case in great detail and embellished their opinion with the logic of the situation, distinguishing the line of demarkation between reasonable diligence on the one hand and abandonment upon the other. These words were used: "There is a wide margin between the line of abandonment and that of reasonable diligence, and we have no doubt the courts will so apply the rule of diligence, under this section, that the prompt and energetic prosecutor of a tunnel will receive the just rewards the act of congress guarantees to his diligence, while the slothful and negligent will not be permitted to deprive the other prospectors of the rights and privileges the act secures to them."[1]

§ 555. Abandonment and forfeiture of a tunnel controlled by general rules.— In an earnest desire, and we believe a just one, to restrict tunnel rights within the narrowest limits as respects the duty to perform work thereon with diligence, the wish might well be expressed that tunnel rights were controlled by special rules. But we feel that the logic of the situation and the law are otherwise; from which we are bound to say that the general doctrine of abandonment applies, and that this is generally a question of fact.[2] And as in all other cases, to constitute an abandonment as distinguished from a forfeiture, there must be a concurrence of the intention to abandon and the actual relinquishment of the property so that it may be appropriated by the next comer.[3] Thus it is that a tunnel right, like any other, may be abandoned; but neglect to work alone does not effect an abandonment, while it may operate

[1] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200.

[2] Marshall v. Harney Peak T. M. & M. Co., 1 S. Dak. 350, 47 N. W. Rep. 290; Taylor v. Middleton, 67 Cal. 656, 8 Pac. Rep. 594; Myers v. Spooner, 55 Cal. 257; *ante*, §§ 510, 511, 512, 543, 544 and notes.

[3] Judson v. Mallory, 40 Cal. 299.

to deprive the tunnel claimant of his rights to blind lodes on the line of the tunnel.[1]

§ 556. Forfeiture under the special six months' rule.— The law provides for a forfeiture if the work upon the tunnel shall be stopped for a period of six months. But no dog-in-the-manger policy, perfunctory work, or merely doing a day's work in each six months, will satisfy the statute. A failure to prosecute the work on the tunnel for six months shall be considered an abandonment of the right to all undiscovered veins on the line of such tunnel, says the statute.[2] It is apparent that honest, diligent work alone will satisfy the statute; that is to say, reasonable diligence under all the circumstances.[3] In the language of the circuit court of appeals, speaking of the statute, "the last clause provides that the failure to prosecute the work upon the tunnel will be construed as an abandonment," etc.[4]

ARTICLE E.

Resumption After Forfeiture.

§ 560. No forfeiture or abandonment is complete until entry and relocation by relocator.
561. Resumption before relocation saves from forfeiture — *Bona fide* resumption necessary.
562. Race with a relocator not required — The general rule.
563. Same — What is a sufficient resumption.
564. An extreme doctrine as announced by the supreme court of California — Trifling with the law.

[1] Morr. Min. Rights (8th ed.), p. 183. See also Fissure M. Co. v. Old Susan M. Co. (Utah), 63 Pac. Rep. 587.

[2] R. S. U. S., § 2323.

[3] Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471; Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 110; Copp's Min. Lands, p. 34; Ellet v. Campbell, 18 Colo. 510, 33 Pac. Rep. 521; Corning T. Co. v. Pell, 4 Colo. 507; Back v. Sierra Nevada Mining Co., 2 Idaho, 886, 17 Pac. Rep. 83.

[4] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200, 13 C. C. A. 396.

§ 560. No forfeiture or abandonment is complete until entry and relocation by relocator.— Manifestly neither abandonment nor forfeiture under the federal statute can result, *ipso facto*, from any act or omission on the part of a claim owner alone; that is to say, no mere statute of limitations runs against the claim owner in this regard. There must be some person seeking to make a location in good faith to claim it. Whence it follows that until entry and location by a relocator asserting his rights, and the completion of the relocation in the manner required by law, the original locator may re-enter and resume his original estate. Thus it is,—

§ 561. Resumption before relocation saves from forfeiture — Bona fide resumption necessary.— The proviso in the statute "that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such relocation,"[1] has been construed by the courts to mean that any failure to do annual labor, for whatever length of time, does not of itself constitute a forfeiture, unless a relocation of the claim has been made by others after the claim is open to forfeiture and before the owner has resumed operations.[2] The supreme court of the United States defined the rights of the original locator thus: "His rights after resumption are precisely what they would have been had no default occurred."[3]

In California the following instruction was upheld: "Unless, before the alleged location by the defendant of the ground in controversy, the plaintiff had done some work with the *bona fide* intention of doing the balance of the work during the year, . . . it is against the policy of the law, and a fraud against the government and the law, to hold quartz claims by merely doing a few dollars' worth of work

[1] R. S. U. S., § 2324.

[2] Justice M. Co. v. Barclay, 82 Fed. Rep. 554; Belcher Cons. M. Co. v. Deferarri, 62 Cal. 160; Hirschler v. McKendricks, 16 Mont. 211, 40 Pac. Rep. 290; Lacy v. Woodward, 5 N. Mex. 583, 25 Pac. Rep. 785; Bishop v. Baisley, 28 Oreg. 119, 41 Pac. Rep. 186.

[3] Belk v. Meagher, 104 U. S. 279.

thereon at or near the year next following the year in which claimant failed to do the necessary work, when such work is not commenced with a *bona fide* intention of being continued until the full amount is done."[1]

The supreme court of Montana has held that however derelict the original locator may have been in performing his annual labor, if he has resumed operations upon his mining claim with the *bona fide* intention of continuing operations until the requisite amount of work has been done, before the claim has been actually located by another, he will be entitled to hold his claim.[2]

§ 562. Race with relocator not required — General rule. Here, as in the case of ordinary resumption of work, a race with the relocator is not required. And where the intention to abandon does not exist, but, on the contrary, the original locator intends to resume, and is seasonably and in good faith seeking to assert his rights, with the honest intention of resuming operations, he will generally be protected in such resumption under his original title.[3] As was said by the supreme court of Arizona: "It is also well settled that until a claim has been abandoned or has been forfeited, no other location can be made of the ground. The decisions go so far as to make it settled law that, if the first locator resumes work at any time even after the ex-

[1] McCormick v. Baldwin, 104 Cal. 227, 37 Pac. Rep. 903.

[2] Honaker v. Martin, 11 Mont. 91, 27 Pac. Rep. 397. See also Hirschler v. McKendricks, 16 Mont. 211; Gonn v. Russell, 3 Mont. 358; Belk v. Meagher, 3 Mont. 65; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 7 Sawy. 96; Lakin v. Sierra Buttes M. Co., 25 Fed. Rep. 337, 11 Sawy. 232; Little Gunnell M. Co. v. Kimber, 15 Fed. Cas. 649.

[3] Pharis v. Muldoon, 75 Cal. 284, 17 Pac. Rep. 70; Newbill v. Thurston, 65 Cal. 419, 4 Pac. Rep. 409; Belcher Cons. G. M. Co. v. Deferrari, 62 Cal. 163; Justice M. Co. v. Barclay, 82 Fed. Rep. 554; Little Gunnell M. Co. v. Kimber, 15 Fed. Cas. 629, No. 8,402; Jordan v. Duke, 53 Pac. Rep. 197; Gonn v. Russell, *supra;* Klopenstine v. Hays, 20 Utah, 45, 57 Pac. Rep. 712.

piration of the year, but before other rights attach in favor of relocators, he preserves his claim.[1]

§ 563. Same — What is a sufficient resumption. — As we have seen, it is not the policy of the law to require a race by the original locator with a relocator. And where a party is seeking to avail himself of the failure on the part of the original locator to do the requisite amount of work, he must, in making his relocation, comply with the law in all respects, or his relocation will be of no avail, as against the original locator, who has undertaken in the meantime, in good faith, to resume operations.[2] Thus, in a California case where the work was not done, as required by law, during a certain year, the would-be relocator, on the first of January following, posted his notice of location, but did not mark his boundaries until the fifth day of January. In the meantime, at the usual hour of commencing work, on the first of January, the original owner resumed work and did ten dollars' worth of work before the fifth day of January, and afterward during that year performed two hundred dollars' worth of additional work and improvements. The supreme court, in deciding the case, held that the marking of boundaries being essential to constitute a valid location, a sufficient resumption had occurred before such location was completed.[3] The facts in this case show an apparent honest intention on the part of the original locator to resume operations upon his claim, and to in all respects comply with the statute, which is all that is required. The decision is undoubtedly correct.[4]

§ 564. An extreme doctrine as announced by the supreme court of California — Trifling with the law. — The supreme court of California, in one case, took occasion to

[1] Jordan v. Duke, 58 Pac. Rep. 197. See also Belk v. Meagher, 104 U. S. 279.

[2] Lacey v. Woodward, 5 N. Mex. 583, 25 Pac. Rep. 785; Newbill v. Thurston, 65 Cal. 419, 4 Pac. Rep. 409.

[3] Pharis v. Muldoon, 75 Cal. 264, 17 Pac. Rep. 70. See also Newbill v. Thurston, *supra*.

[4] See authorities cited in notes to § 491, *ante*. But see *post*, § 564.

go, as we view it, very much to the extreme in announcing what constitutes a sufficient resumption. The facts showed that no work at all had been done during an entire year. The following January the original locator re-entered his claim and did about twenty-four dollars' worth of work, and again departed from it. The following August, no further work having been done, a relocator entered upon the ground and effected a valid location of the property. The court held this relocation premature, using the following language: "It is not necessary to decide that an attempt to assert a continuous right may be based upon a pretense of work so plainly a sham as that it will be disregarded. But here the work done was actual and valuable. The letter of the statute upholds the view, as to resumption of work, taken by the court below (that work had been resumed), and forfeitures and denouncements are not to be favored by basing them upon language which does not plainly and unmistakably provide for them."[1] With entire deference to the court, we think such a construction as this is not warranted by the language of the statute and is not in conformity with its letter or spirit. To say that because the improvements are "actual and valuable" a lesser amount than is required by statute will be sanctioned is in effect to say that the value of the labor or improvement is not important. Congress undoubtedly intended by this statute to require a certain amount in value of labor and improvements upon each claim during each year, and the court seems either to have overlooked this feature or to have entirely ignored it, and decided the case with a greater show of strength than of reason. As said by the supreme court of Montana: "Such a decision is only trifling with the law and the rights of the parties based on the law."[2]

[1] Belcher Cons. G. M. Co. v. Deferari, 62 Cal. 160.

[2] Honaker v. Martin, 11 Mont. 91, 27 Pac. Rep. 397, quoting from Morr. Min. Rights (6th ed.), p. 61.

CHAPTER IV.

RELOCATION — WHEN, BY WHOM AND UNDER WHAT CIRCUMSTANCES MAY BE MADE — AND HEREIN OF EXTENDING BOUNDARIES AND AMENDING BY RELOCATION.

§ 570. Preliminary — Whence the law — Spanish and Mexican law prior to acquisition of California.
571. The statute and its provisions.
572. Relocation — When and under what circumstances made — Not forfeiture or abandonment of previous claim.
573. Same subject — When a relocation may or may not be made — Where would-be relocator has conveyed claim — Estoppel to deny validity.
574. Overlapping claims — Necessity of relocating.
575. May be made by amendment — No relocation permissible merely because proof of labor not filed.
576. Priority, when waived — Burden of proof of forfeiture.
577. Further of relocation in the form of amendments.
578. No exploration or new discovery necessary.
579. Same subject — Observations as to new discovery shaft.
580. Relocation — Admissions by — Takes effect from its own date.
581. Marking essential — All other acts same as original location.
582. Relocator entitled to improvements — But not to apply them on patent work.
583. By whom relocation may be made — Including former owners.
584. Same subject — Relocations made by former owners — Land public property.
585. May be done in hostility to other co-tenants.
586. Contrary rule where trust or fiduciary relations or contracts between the parties intervene.
587. Other circumstances of trust — Agency — Mining partnership — Prospecting contract.
588. Summary — The doctrine of this chapter restated.

§ 570. Preliminary — Whence the law — Spanish and Mexican law prior to acquisition of California. — By the law in force in Mexico, or New Spain, as it was also called prior to the acquisition of California from Mexico, and conse-

quently the law which was in force over the territory so acquired, there was ample provision for the case where there was a failure to do the required work. They had there a judicial or *quasi*-judicial proceeding to determine the rights of the previous claimant and whether the relocator, or denouncer, was entitled to possess the claim. Indeed much litigation would doubtless be saved if our own law required some such proceeding. The principal objection to be urged against it would likely be the cost that would probably have to be borne by the poor prospector; but we believe the best interests of all would be subserved if the government furnished such a tribunal, for a mere nominal fee, in the shape of a tax. By the Mexican law it was provided, "whoever shall denounce, in the terms hereinafter expressed, any mine that has been deserted and abandoned shall have his denouncement received if he therein sets forth the circumstances already declared in section IV (the provisions relative to registry in the first instance), the actual existence of the mine in question, the name of its last possessor, if he is acquainted with the same, and those of the neighboring mines, all of whom shall be lawfully summoned. And if within ten days they do not appear, the denouncement shall be publicly declared on the three following Sundays. This meeting with no opposition, it shall be signified to the denouncer that within sixty days he must have cleared and reinstated some work of considerable depth, or at least of ten yards perpendicular, and in the bed of the vein, in order that the mining inspector may inspect its course and inclination, and all its peculiar circumstances, as declared in the above named section IV." Provision is also made in the same chapter for the case where the former owner should appear and oppose the denouncement; and if he makes good his claim the denouncer pays the expenses, otherwise the former owner pays them. And if the denouncer does not do the required work within sixty days, he loses his right, and it is again open to denouncement. It thus provides a simple method for adjusting matters,

while the circumstances are fresh in the minds of the witnesses, and to establish the rights of the relocator before he expends any considerable amount of money.

§ 571. The statute and its provisions.— Having thus seen what led up to the enactment of the statute, we may next inquire into the provisions of the statute and the rulings of the courts on the same. The statute is a portion of section 2324, and after providing for the case of a failure to perform labor, it reads as follows: . . . "The claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." If we will bear in mind the strict reading of this statute, it will save us much trouble in reconciling some seeming inconsistencies in the opinions of the courts and of writers. It is that for all purposes the claim or mine is restored to the public domain, is again a part of it, and being so, is open to exploration and location as though no location had ever been made.

§ 572. Relocation — When and under what circumstances made — Not forfeiture or abandonment of previous claim.— It necessarily follows, from the reasoning of the authorities cited in the chapter relative to forfeitures, that a claim is not the subject of relocation until the rights of the former locator have terminated in some manner known to and recognized by the law. Following this principle the federal court has held that a relocation of a mining claim made before the period for performing annual labor has expired, and consequently before the owner is in default for failure to do the annual labor, is a mere nullity. And a claim not being subject to relocation until such default, his continued failure to do the work will not validate a relocation made before forfeiture.[1]

The supreme court of the United States has held that, since the right to locate mining property in the first in-

[1] Slavonian M. Co. v. Perasich, 7 Fed. Rep. 831.

stance is a privilege conferred by congress, it can only be exercised within the limits prescribed, and therefore a location made upon lands actually held at the time under a prior valid and subsisting location will be void. [1] And this is only another way of saying that where the first location of a mining claim is valid and the locators have kept it alive by a compliance with labor laws, any subsequent location, however regular in form, will be of no effect.[2]

It has been held that the fact of relocation is a solemn admission of the validity of the previous location, and that the relocator claims by virtue of a forfeiture thereof.[3] But if testimony on behalf of the owner of a claim that it is located over an older location is not an admission that the claim was valid,[4] perhaps this is going farther than is necessary in all cases, and that it could not be held an admission for all purposes.[5]

§ 573. Same subject — When a relocation may or may not be made — Where would-be relocator has conveyed claim — Estoppel to deny validity. — It has become axiomatic in mining law that a location to be good at all must be good when made. The fiction of relation of acts, except for the purpose of amendments and a few other cases not

[1] Belk v. Meagher, 104 U. S. 279.

[2] Rose v. Richmond M. Co., 17 Nev. 25; Garthe v. Hart, 73 Cal. 541, 15 Pac. Rep. 91; Hall v. Arnott, 80 Cal. 348, 22 Pac. Rep. 200; Taylor v. Middleton, 67 Cal. 656, 8 Pac. Rep. 594; Belk v. Meagher, *supra;* Erhardt v. Boaro, 113 U. S. 527; Book v. Justice M. Co., 58 Fed. Rep. 106; Aurora Hill M. Co. v. Eighty-five M. Co., 34 Fed. Rep. 515; Strang v. Ryan, 46 Cal. 33; Souter v. Maguire, 78 Cal. 543; Du Pratt v. James, 65 Cal. 5; Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356; Branagan v. Dulaney, 2 L. D. 744; Stewart v. Rees, 25 L. D. 447; Kinney v. Fleming, 56 Pac. Rep. 753; Blake v. Thorne (Ariz.), 16 Pac. Rep. 270; Armstrong v. Lower, 5 Colo. 398; Weise v. Barker, 7 Colo. 178, 2 Pac. Rep. 921; Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413; Gonn v. Russell, 3 Mont. 358; Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1037; South End M. Co. v. Tinney, 22 Nev. 122, 35 Pac. Rep. 89; Wills v. Blain, 5 N. Mex. 238, 20 Pac. Rep. 798; and see *post*, next section.

[3] Wills v. Blain, *supra;* Belk v. Meagher, *supra.*

[4] Patchen v. Keeley, 19 Nev. 404, 14 Pac. Rep. 347, 350.

[5] See *post*, § 580.

necessary to mention here, has in general no application to mining claims.[1] And for this reason, even though a location should be made upon a mining claim, and by this is meant an original or a relocation at a time when the ground is not open to relocation, no abandonment or other act by any other claimant will make it good. Nothing short of a relocation after abandonment, or after extinguishment of the previous right, will make it good. No relocator, or other locator of a mining claim, can avail himself of the mineral in the public land which another has discovered until that other has abandoned the ground or his right has become forfeited[2] or otherwise properly extinguished.[3] But it has been held that the prior claim is so extinguished, for the purpose of a particular case at least, regardless of the fact, when the former owner in open court so testifies.[4] But there must be some right to be so extinguished before there can be a relocation. There is a difference between a relocation and the first location of a previously discovered lode. In the one case the previous location and all rights thereunder must have ended, while in the other the discoverer must have slept upon his rights, or waived them to such an extent as to justify a peaceable entry for the purpose of location.[5] But there are cases where the would-be relocator would be estopped from asserting the previous location invalid and setting up a new location in opposition to it, or from declaring that it had ended, and thus setting up a claim against it; as, for instance, where he had by his deed or mortgage granted away the previous right and thereby asserted its validity.[6]

[1] Jordan v. Duke (Ariz.), 53 Pac. Rep. 197.

[2] Book v. Justice M. Co., 58 Fed. Rep. 106; Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 443; Belk v. Meagher, 104 U. S. 279.

[3] Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413.

[4] Carter v. Bacigalupi, 83 Cal. 117, 23 Pac. Rep. 361.

[5] Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. Rep. 266.

[6] Blake v. Thorne (Ariz.), 16 Pac. Rep. 270. See *post*, § 586.

§ 574. Overlapping claims — Necessity of relocating.— It thus becomes plain that where there are overlapping claims, and the senior location is abandoned, or otherwise lost or forfeited, and therefore open to relocation, the area in conflict does not thereby become the property of the junior overlapping claim; and in order to avoid being classed as an overlapping claim it is necessary that the ground forfeited or abandoned be claimed by relocation, and this whether it be an entire claim or only a conflicting area.[1] It is not enough that it is lost to the former claimant, it must be claimed by the new one.[2]

§ 575. May be made by amendment — No relocation permissible merely because proof of labor not filed.— It is of little consequence whether the ground is claimed by a relocation *in toto* as a new claim, or whether it be by amendment of the old claim. In either case the same result is accomplished. Thus, in Arizona an amendment was made during the trial by which the lines were corrected and adjusted the same as a relocation, and it was held not error to admit it in evidence.[3] But it is not open to amendment or relocation from the mere fact of failure to file proof of annual labor, as required by local statute.[4] It is only when the ground so sought to be included is actually open to location that an amendment or relocation can be spread over it.

§ 576. Priority, when waived — Burden of proof of forfeiture.— Thus, one whose title is bad under the existing location may relocate the claim and base his title on such

[1] Belk v. Meagher, 3 Mont. 65; s. c., 104 U. S. 279; Oscamp v. Crystal River M. Co., 58 Fed. Rep. 293, 7 C. C. A. 253; Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 173; Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 443; Hall v. Arnott, 80 Cal. 348, 22 Pac. Rep. 200. And see *ante*, § 491.

[2] Oscamp v. Crystal River M. Co., *supra*. And see *post*, § 577.

[3] Jordan v. Duke (Ariz.), 53 Pac. Rep. 197.

[4] Harris v. Kellogg, 117 Cal. 484, 49 Pac. Rep. 708. See also Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 173. See *ante*, § 496. See also as to additional location certificate, Duncan v. Fulton (Colo. App.), 61 Pac. Rep. 244.

relocation.[1] The first in time is always the strongest in right, all other things being equal; but where the first locator fails to adverse the junior locator's application for patent, he waives his priority;[2] and where relocation or amendment is made in consequence of a supposed forfeiture or abandonment, the burden of proof is on the party alleging or claiming such forfeiture, and he must establish the same by a preponderance of the evidence.[3]

§ 577. Further of relocation in the form of amendments.— We have elsewhere, we think, thoroughly explained the law on the subject of *addenda* and amendments. But there have been a few cases brought before the courts where they have been made in the form of relocations, although they are not strictly and properly such, but are only amendments. Thus, in a California case it was held that a relocation for the sole purpose of correcting an error in the original location may be made, but only where the rights of others have not intervened between the acts, and such relocation cannot change or affect the title to the same ground acquired by the original location.[4] In Colorado it was held that where the owner of a claim relocates it under a different name, in order to protect his rights and to preserve the claim from relocation by others, until he can obtain title by deeds from the original owners, and work is done under both titles, such work will inure to the benefit of the original claim as afterwards deeded to him.[5] The supreme court of Nevada, in an exhaustive opinion by

[1] Meyendorf v. Frohner, 3 Mont. 282; Perego v. Erwin, 85 Fed. Rep. 904; affirmed, 93 Fed. Rep. 608; Silver City G. & S. M. Co. v. Lowry, 19 Utah, 334, 57 Pac. Rep. 11.

[2] Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80, 1 Pac. Rep. 448.

[3] Quigley v. Gillett, 101 Cal. 462, 35 Pac. Rep. 1040; Coleman v. Curtis, 12 Mont. 301, 30 Pac. Rep. 266; Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 173; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 654; McNeil v. Pace, 3 L. D. 267; Smith v. North American M. Co., 1 Nev. 423; Armstrong v. Lower, 6 Colo. 393.

[4] Hall v. Arnott, 80 Cal. 348, 22 Pac. Rep. 200.

[5] Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 173.

Hawley, C. J., held that where one or more of the parties first locating mining ground afterwards makes a relocation of the same ground with the names of other parties added to the notice of location, it appearing that at the time of the second location the ground was undeveloped, and it was not known that both notices were upon the same ground, and it further appearing that the second notice was posted for the express purpose of protecting the original location, the second location did not, under such circumstances, constitute an abandonment of the first location.[1] In Colorado, although this was under a particular statute in existence there, it was held that an additional location, or relocation for the purpose of correcting errors, might be made, and it would relate to the original location.[2]

It seems unnecessary to add to this section that where new ground becomes locatable as a part of the original location, as is the case of the overlapping location dying out, or a consolidation of two or more narrow claims into one wide one, that a new location, or amended location, which would be the better form, can be made, and it would relate back to the original discovery and location of the oldest claim located; it being a familiar principle of the doctrine of relation that it will always operate to aid a title but never to defeat one.

§ 578. No exploration or new discovery necessary.— It is generally well settled, and obviously so, that in making a relocation no exploration or new discovery is necessary, in the absence of a state statute or local regulation;[3] but in some states it is made necessary by statute to sink a new discovery shaft, or sink the old shaft or cut ten feet deeper. Of course, wherever that is required, the statute

[1] Weill v. Lucerne M. Co., 11 Nev. 200.

[2] McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 654. And see *ante*, § 574.

[3] Little Gunnell M. Co. v. Kimber, 15 Fed. Cas. 629, No. 8,402; Armstrong v. Lower, 6 Colo. 392; Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. Rep. 266; Hays v. Lavignino, 17 Utah, 185, 53 Pac. Rep. 1029; Klopenstine v. Hays, 20 Utah, 45, 57 Pac. Rep. 712.

or rule must be complied with, as in an original location, and the same time for completion is allowed for that purpose.[1] Affirming the necessity of obeying the requirements of state statutes upon this subject, the following words are from the supreme court of Montana: "Whenever there are statutory provisions fixing the time within which, after discovery, the prescribed work necessary to a valid location must be done in order to secure the claim, it is held that the discoverer (or relocator, as the case may be) has the full time provided in the statute to complete it."[2] These authorities demonstrate plainly that local laws requiring location work are within the authority granted by congress and must be complied with.[3]

§ 579. Same subject — Observations as to new discovery shaft.—In the previous chapter, dealing with the subject of location in the first instance, is found almost all that seems necessary to be said on the subject of discovery and discovery shafts.[4] It follows, of necessity, that upon the ground being open to relocation as though no location had ever been made, the new locator must comply with the law fully, to all intents and purposes, the same as if making a new location, excluding the single circumstance of a discovery of mineral where the old location contains such discovery. But in Colorado, and other states having the same law, there is a local statute requiring the discovery shaft to be sunk ten feet deeper and new stakes to be set up and marked.

[1] Lakin v. Sierra Buttes G. M. Co., 25 Fed. Rep. 337; Slavonian M. Co. v. Perasich, 7 Fed. Rep. 331; Pharis v. Muldoon, 76 Cal. 264, 17 Pac. Rep. 70.

[2] Bramlett v. Flick, 23 Mont. 95, 57 Pac. Rep. 869, citing (which see) Lindl. Mines, § 339; Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 443; Erhardt v. Boaro, 113 U. S. 527; Marshall v. Harney Peak T. M. & M. Co., 1 S. Dak. 350, 47 N. W. Rep. 290; Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1047; Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 190.

[3] See authorities in last preceding note. See also Sissons v. Sommers, 24 Nev. 379, 55 Pac. Rep. 829; Electro Magnetic M. & D. Co. v. Van Auken, 9 Colo. 204, 11 Pac. Rep. 80.

[4] *Ante*, Part VII, ch. II.

Of course, independent of this statute, there ought to be such a showing of work upon the ground and of new monuments as to plainly mark the location so as to indicate to all comers that the ground has been re-appropriated. But, inasmuch as one of the Colorado cases at least went to a very serious extreme in this matter, it will not be amiss to notice how the Colorado courts stand upon the question. The court held that a relocation is made in substantially the same manner as the original location of a mining claim; the relocator must perform all the acts required in making a valid original location, in the same manner and within the same time as though the premises had always remained a part of the public domain, except that he may adopt the boundary stakes of the claim, and instead of sinking a new shaft he may sink the old one ten feet deeper. And in a later case the circuit court for the district of Colorado,[1] following the Colorado law, held that the relocator might go into the old shaft and sink it ten feet deeper, or make any cut or adit upon the ground sufficient in the first instance; that he had the same time to do this that he would have to make an original location, and unless he did so the former owner had a right to re-enter. And it was said further in the syllabus, fully borne out by the charge to the jury, that it was not enough that the relocator had run a drift into the claim from the bottom of a shaft on an adjoining claim. We think that this is going to an extreme length, and that it would depend upon circumstances as to whether such a drift would not be sufficient even under the Colorado statute. Perhaps the ruling of the court was correct under the facts in the case, but a case might easily be imagined where a drift only a few feet under ground, and on the strike of the vein, might extend from adjoining into new ground, disclosing the vein at a depth of ten feet or more, and it must be evident to every lawyer that this would be a compliance with the Colorado statute, and certainly sufficient under any law. It was in effect so held

[1] Little Gunnell M. Co. v. Kimber, 15 Fed. Cas. 629, No. 8,402; 1 M. R. 536.

in a case in the United States circuit court for the district of Nevada[1] by Judge Hawley, and the soundness of the position seems to us indisputable. It seems strange indeed that so able a judge as Judge Hallett would have restricted the rule within such narrow limits as he did on the occasion above mentioned, and we do not think he would follow that rule now, at least other judges would not, and should not.

§ 580. Relocation — Admissions by — Takes effect from its own date.— We have already seen that, for some purposes at least, the relocation admits the validity of a prior location. This is the general but not unqualified rule, and is so held by the supreme court of the United States and other respectable courts.[2] Manifestly this rule is restricted to the special exigencies of the case. Wherever it obtains, the resultant duty is also imposed upon the relocator to show that such prior location is extinguished by failure to do the assessment work. So said the supreme court of California,[3] and this is settled law.[4] In the Golden Fleece case[5] it was held that where the first locator who takes up a claim is not a citizen, or has forfeited his rights by non-compliance with the mining laws, or has abandoned his claim, the mining ground staked off by him is open to location by any citizen of the United States. And in a late case in the circuit court for the district of Colorado, it was held that if ground once included within the location of a lode mining claim be abandoned, and a new mining claim located thereon as abandoned ground, said location takes effect only from its own date, and does not relate back to or obtain any rights from the location which has been abandoned.[6] This would

[1] Book v. Justice M. Co., 58 Fed. Rep. 106.

[2] Hammer v. Garfield M. Co., 130 U. S. 291.

[3] Quigley v. Gillett, 101 Cal. 462, 35 Pac. Rep. 1040.

[4] *Ante*, §§ 576, 543, 544, 545 and notes.

[5] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[6] Cheesman v. Shreeve, 40 Fed. Rep. 787. See also Morgan v. Tillotson, 78 Cal. 520, 15 Pac. Rep. 88; Russell v. Brosseau, 65 Cal. 105, 4 Pac. Rep. 645; Jackson v. Roby, 109 U. S. 440.

be the rule beyond question if the relocation was made as such. If, however, it were made by way of amendment, the rule would be different, and in the absence of intervening conflicting rights it would relate to the date of location of the claim so amended.[1]

§ 581. Marking essential — All other acts same as original location.— Bearing in mind that an abandoned claim is public property the same as if no location had ever been made, it necessarily follows that, in making relocation, all the acts, including the marking of the location upon the ground, posting notices and recording the claim in the manner required by local rule or state statute, must be done the same as in making an original location.[2] And a party relocating an abandoned claim may, in prosecuting work thereon, either sink new shafts and run new tunnels, or continue the work upon such shafts or tunnels as may have been constructed by parties who have abandoned the same.[3]

§ 582. Relocator entitled to improvements — But not to apply them on patent work.— Following the same line of thought enunciated by the learned commissioner in the case cited in the last section, it may be stated as a general rule that such improvements of a permanent nature as the relocator may find upon the ground go with the land and belong with the relocation.[4] But for obvious reasons, prominent among which is that the applicant for patent must himself spend five hundred dollars for improvements, the land department holds that he may not count as such ex-

[1] *Ante*, Part VII, ch. V.

[2] As to marking and recording, generally, see *ante*, Part VII, chs. III, IV; Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413; Armstrong v. Lower, 6 Colo. 393; Little Gunnell M. Co. v. Kimber, 15 Fed. Cas. 629, No. 8,402.

[3] Commissioner to L. E. Morgan, June 2, 1876, Copp's Min. Lands, 192, 3 C. L. O. 50.

[4] Collins v. Bartlett, 44 Cal. 371; Pennebacker v. McDougall, 48 Cal. 163; McTiernan v. Hesse, 51 Cal. 594; Treadway v. Sharon, 7 Nev. 37; Deffeback v. Hawke, 115 U. S. 392; Spark v. Pierce, id. 408.

penditures workings previously made upon the claim by others and afterwards abandoned.[1]

§ 583. By whom relocation may be made — Including former owners.— The forfeited or abandoned mining claim being restored to the public domain, it would seem almost unnecessary to say that it is open to relocation for all comers, and yet the matter was doubted and contrary views held upon it for a long time, although it may now be considered as settled. Where fiduciary or other contractual relations exist between parties, as between former owners, there may be circumstances, which we shall discuss in the proper place, where such relocation would inure to the benefit of a former co-tenant; but that does not rest upon this branch of the law, but rather upon another and quite a different proposition. In a letter of Commissioner Holcomb,[2] it was decided that where a lode claim has been located by several persons jointly, and thereafter the proper expenditures have not been made, the claim may be relocated by one of the claimants to the exclusion of his co-claimants. This we have always understood to be the law.[3] That is, of course, where the co-tenant who makes the relocation was under no moral or legal obligation to protect the rights of one or more of his co-tenants; of course where such a condition existed, depending upon another familiar rule of the law having no other connection with the mining law, he would be in conscience bound to protect the rights of such co-locator; but we have never heard it seriously doubted until the recent very able work of Mr. Lindley,[4] that, where all had absolutely failed, one or more of the former locators could relocate. Mr. Morrison seems to think that this question is finally settled by the supreme court of the United States.[5] But we do not understand that the case in ques-

[1] Re Embry, 7 C. L. O. 5; R. S. U. S., § 2322; Holcomb to Boehmer, Copp's Min. Lands, 300.

[2] Acting Com'r Holcomb to Max Boehmer, March 15, 1881, Copp's Min. Lands, p. 300.

[3] See Strang v. Ryan, 46 Cal. 33.

[4] Lindl. Mines, § 406.

[5] Turner v. Sawyer, 150 U. S. 578; Morr. Min. Rights (8th ed.), p. 88. See *post*, § 585.

tion decides any such thing. There, if we read it correctly, it was an outstanding title, namely, the patent, which Turner had secured by fraud of the rights of Sawyer, which inured to his benefit, and not any rights acquired by any supposed relocation. They rest on quite different and distinct principles. That is, to state the matter more distinctly, the mere circumstance of being a co-tenant does not impose the duty to protect, in and by the relocation, the rights of former co-tenants.

§ 584. Same subject — Relocations made by former owners — Land public property. — Since it is settled law and the plain reading of the statute that "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made;"[1] and since there is necessarily no connection between the old and the new claim except for the purpose of distinctly showing the intention to extinguish the old claim and inaugurate a new one, with due deference to some contrary opinion, we feel justified in saying that it has become settled law, recognized alike by the courts and the land department, that any qualified person, including one or more of the original locators, may relocate the claim.[2]

The supreme court of Utah thus correctly states the rule: "We fail to see why any such right should be denied. The fact that a prior locator, after his right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator; but to give the proviso above quoted the effect claimed by appellant would be to deny to such prior locator a substantial right allowed to strangers. In other words, such a construction, while it would allow a prior locator the right to resume work, would destroy his right to make a new location. We do not think

[1] R. S. U. S., § 2324.

[2] Warnock v. De Witt, 11 Utah, 324, 40 Pac. Rep. 205; Gold Dirt Lode, 10 C. L. O. 119; Commissioner to Max Boehmer, Copp's Min. Lands (2d ed.), 300; Hunt v. Patchen, 35 Fed. Rep. 816; Richards v. Wolfling, 98 Cal. 195, 32 Pac. Rep. 971; Strang v. Ryan, 46 Cal. 33; Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182.

the proviso to the act should be construed to mean anything more than that a prior locator, in addition to the rights of a stranger, should have the right to resume work and thus relieve himself from the forfeiture incurred."[1]

On the contrary, let it be observed, the soundness of this position is more apparent the closer it is scrutinized. The original discoverer, let us say, should be, as he is by the statute, clothed with stronger right, if any preference is to be given, than that bestowed upon a stranger.[2] The supreme court of Nevada puts it thus: "There is no law to prevent a party from relocating his own claim by a different name; and if he does so and then conveys it by the latter name, I can see no reason why the existence of the former location should invalidate the deed."[3] Any other view of the law is said by the supreme court of California to be untenable.[4]

Texas has provided by statute that the original locators shall not be permitted to relocate either directly or indirectly.[5] Of course, in the face of such a provision as this by a tribunal having power to enact it, the original locators may not relocate. And if the framers of the federal statute did not intend a claim to be relocated by the original owners, it would have been easy enough for them to have so stated.

§ 585. May be done in hostility to other co-tenants.— Thus it is that upon the loss of the claim, their relationship as tenants in common ceases, since it existed only with reference to the claim and terminated therewith. From which it follows that, in the absence of other circumstances, creating a trust relation between them, one or more locators or owners may relocate in hostility to all others.[6] The

[1] Warnock v. De Witt, 11 Utah, 324. See also Copp's Min. Lands (2d ed.), 300.

[2] Richards v. Wolfling, 98 Cal. 195. See also Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801, 31 C. C. A. 223; Weill v. Lucerne M. Co., 11 Nev. 200.

[3] Phillpotts v. Blaisdell, 8 Nev. 61.

[4] Richards v. Wolfling, *supra*.

[5] Act of April 30, 1895, secs. 12 and 13; Laws 1895, pp. 197, 201.

[6] See the last preceding section and cases there cited. See also Page v. Summers, 70 Cal. 121, 12

reasoning of the cases, as disclosed in the last preceding section, renders the strength of this position unassailable. We are not aware of anything in the earlier authorities weakening it in the slightest degree; the strength of any opposition to it, as we conceive it to be, lies in the general doctrine of the relationship of tenants in common, from which the principle of law has been enunciated that one tenant in common may do nothing in virtue of that relationship hostile or inimical to the interests of the co-tenancy. The position is impregnable, but has no application here for the reason, as above stated, that their co-tenancy ceases when their right to the property ceases.

Mr. Lindley, in his very able work, arrives at a different conclusion from that reached by us, basing it upon wholly different grounds, namely, that to permit a former locator to relocate his own ground, and thus avoid doing the annual assessment work, would be a fraud upon the government, and therefore ought not to be tolerated.[1]

There is much to be said on both sides of this question. Mr. Lindley says there should be only one way to secure the interest of a co-tenant and that is by advertising him out. But in practice it often happens that incompatible interests are yoked together as tenancies in common in a mining claim, and it is sometimes advantageous, both to the mining industry and to the individual owners, that the tenancy may be broken in this way. Besides, there is the further observation to be made with reference to this practice, that by it the co-tenant relocating only accomplishes directly what he could do, and often does, indirectly, namely, get another to locate for him and convey to him. If it is an evil "the remedy is with the legislative power."[2]

§ 586. Contrary rule where trust or fiduciary relations or contracts between the parties intervene.—It may be safely said, and the authorities, as well under the mining

Pac. Rep. 124; Sanders v. Mackey, 5 Mont. 528, 6 Pac. Rep. 361.

[1] Lindl. Mines, § 405.

[2] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196.

decisions as all others, enunciating the principles controlling co-tenancy, declare certain guiding rules, from which the conclusion is necessarily deduced that where, for a valid consideration, one co-tenant has agreed that the work shall be done on a claim and the same is actually done, or whether done or not, he cannot afterwards for this default relocate it to the exclusion of his co-tenants.[1] But a grantor in a quitclaim deed is not estopped from making a relocation where his grantee fails to do the requisite work; and this whether he granted his entire interest or only a part of it.[2] But the rule would be different in case of a mortgagor attempting to relocate; for, while the mortgagee would have a perfect right to do the assessment work and tack it onto the mortgage with the balance of his claim, still, if he failed to do so and the mortgagor attempted a relocation, it would inure to the benefit of the mortgagee, upon the familiar principle that the after-acquired title always feeds the mortgage.[3] It would not matter in any case, we take it, whether his relocation was in collusion with somebody else or an attempt to deprive the mortgagee of his security. And in a case in Montana, where one of the co-tenants agreed to represent the claim, but failed to do so, and instead relocated it, Wade, C. J., held that while the relocation was valid, still the excluded co-tenant had her other remedy against the relocator for an interest.[4]

§ 587. Other circumstances of trust — Agency — Mining partnership — Prospecting contract. — There are likewise other circumstances of trust relationship out of which a location made by one will inure to the benefit of others.

[1] Doherty v. Morris, 11 Colo. 13, 16 Pac. Rep. 911; s. c., 18 Colo. 105, 28 Pac. Rep. 85; Morr. Min. Rights (8th ed.), p. 88; Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413.

[2] Blake v. Thorne (Ariz.), 16 Pac. Rep. 270. As to estoppel of such grantor to deny validity of locations, see *ante*, § 573.

[3] Alexander v. Sherman (Ariz.), 16 Pac. Rep. 45.

[4] Sanders v. Mackey, 5 Mont. 538, 6 Pac. Rep. 361. See also Van Wagenen v. Carpenter (Colo.), 61 Pac. Rep. 698.

Thus, when an agent in charge of property omits to do the assessment work, and represents it as being done, or conceals the fact of it not being done, and in hostility to his principal secretly relocates the claim, he will be held to have done so on behalf and for the use of his principal.[1] As was said by the supreme court of Idaho in a late case: "But the court below goes further and holds that the relocation made by the defendants inures to the benefit of the plaintiff. Under the pleadings such relief can be had. The conclusion is based upon a finding of fact that, at the time of relocation, the defendant sustained a fiduciary relation to the plaintiffs respecting this property. . . . From this . . . he would not be permitted to relocate the subject his trust for his own benefit."[2]

So, where an agent was employed by an owner to assist a surveyor in matters precedent to securing a patent to mining claims, he could not defeat the party's rights by acting in violation of his duty and posting notices in the name of others.[3] So, where a mining partnership, or other contractual relation, exists between parties,— for example, a prospecting contract or the like,— individual members of it may not act for their personal benefit, and so make a location in violation of their duty under such relationship.[4]

Likewise, where one party who is employed by another to prospect for and locate mining claims certifies in his receipt for wages that his employer's claim is the first one located in the neighborhood, and his employer thereupon procures laborers and expends money in developing the mining claim, the employee is estopped from setting up a prior claim himself, and the truth of such representation is

[1] Utah M. & M. Co. v. Dickert & Myers Sulph. Co., 6 Utah, 183, 21 Pac. Rep. 1002; Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 418.

[2] Lockhart v. Rollins, *supra*.

[3] Largey v. Bartlett, 18 Mont. 265, 44 Pac. Rep. 962. See also Sanders v. Mackey, 5 Mont. 523, 6 Pac. Rep. 361.

[4] See *post*, §§ 1515, 1518, 1531, 1565–1568; Morton v. Solambo M. Co., 26 Cal. 527; Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182; Rush v. French, 1 Ariz. 99, 25 Pac. Rep. 816.

immaterial in such case, resting upon the general doctrine of estoppel.[1]

§ 588. Summary — The doctrine of this chapter restated.— It thus appears that relocation has, by the mutations of circumstance, acquired a peculiar and distinctive niche in the structure of mining law.

That it must be made in all respects the same as an original location, and that all the law applicable to that is also applicable to this.

That for some purposes it admits the existence, and in some cases the validity, of the former location. Indeed, the existence as a fact of the former location is the basis upon which it rests, but its validity may always be disputed, unless the relocation be made under such circumstances as in law amount to estoppel.

That it may be made by one tenant in common in hostility to all others, since their relationship as such, terminates with the loss of the claim, provided always that there is no duplicity in making the relocation, nor any circumstances of a fiduciary character by which the resultant benefit inures to all. Also that a claim may be relocated by the former locator.

That care should be observed in making a relocation to characterize it as such, in order to distinguish it from the original location, and to save any question of overlapping location. And the safer course in all such cases is to characterize it as a relocation of any and all claims that ever existed upon or to the ground, for the reason that the same are abandoned and forfeited.

It is quite manifest also that upon a complete relocation and compliance with the laws, rules and regulations in force at the time, both federal and local, the same character and nature of estate is acquired, and the same duties imposed, as in the case of an original location.

[1] Fuller v. Harris, 29 Fed. Rep. 814.

PART IX.

OF THE LAND DEPARTMENT.

CHAPTER I.

OF THE GENERAL JURISDICTION OF THE LAND DEPARTMENT, INCLUDING THE JURISDICTION AND FUNCTIONS OF ALL SUBORDINATE DEPARTMENTS.

§ 595. Preliminary observations — Why reproduced here.
596. The organization of the interior department and its functions in connection with mining claims.
597. Functions of the department — How exercised.
598. Regulations of the department have the force and effect of law.
599. Presumptions in favor of regularity.
600. Binding force of the decisions of the department upon questions of fact or upon mixed questions.
601. Contemporaneous construction of the statutes by the department.

§ 595. Preliminary observations — Why reproduced here.— Law books being the working tools of the busy lawyer, their value is enhanced or diminished according as they furnish all the information he seeks. The jurisdiction and functions of the land department of the government are often brought in question in the determination of matters submitted to the consideration of the mining lawyer. He will be better able to answer the necessary questions with certainty and satisfaction to himself and usefulness to his client, if all matters are grouped together and brought to his attention in one book or set of books.

§ 596. The organization of the interior department and its functions in connection with mining claims.— It is common history that prior to 1849 the functions now ex-

ercised by the department of the interior respecting public lands devolved upon the department of the treasury.[1] In that year, however, congress passed a law creating the department of the interior,[2] and by various amendments thereto providing for extending the organization in detail of the land department thereof has committed the entire charge and disposal of public lands to that department.[3] The land department was until that time a bureau of the department of the treasury.[4]

§ 597. Functions of the department — How exercised. The functions of the department, so far as applied to our inquiry, are exercised by the secretary as the supervisory power, the details of whose business relating to public lands are performed under the direction of the assistant attorney-general for the interior department. The actions and duties of surveyors-general and of registers and receivers are under the supervision of the commissioner of the general land office.[5] From this supervisory control flows the right of appeal, controlled by general regulations issued by the department, whereby appeals are allowed from the surveyor-general of any state or territory and from the register or receiver of any land district to the commissioner of the general land office, and from him in turn to the secretary of the interior.[6] The recorder of the general land office is also a functionary of this department and under its control.[7] Likewise the secretary, specially authorized by congress,[8] who is authorized to sign the president's name for him to all land patents.

[1] Analysis of Our Government, by Bancroft, p. 330.

[2] Act of March 3, 1849, 9 Stat. at L., p. 395; R. S. U. S., 437 *et seq.*

[3] See R. S. U. S., tit. XI, ch. III, for act creating commissioner of the general land office. See act of April 25, 1812, 2 Stat. at L., p. 717.

[4] Instructions, 18 L. D. 18; Snyder v. Sickels, 98 U. S. 203.

[5] R. S. U. S., tit. XI, ch. III, §§ 453 *et seq.*; Parker v. Duff, 47 Cal. 554.

[6] Richard Dotson, 12 L. D. 275–279; Rules 42–51.

[7] R. S. U. S., 447, 453.

[8] Act of July 4, 1836, 5 Stat. at L., p. 111; R. S. U. S. 450.

§ 598. Regulations of the department have the force and effect of law.— The regulations of the department, promulgated by or under the authority of the secretary of the interior, are manifestly of the same dignity as ordinary rules of court, and if made in conformity to the statutes have, for the time being, all the force and effect of law.[1] But of course these regulations will never be permitted to defeat a statutory right,[2] nor in any way to abridge the same.[3]

§ 599. Presumptions in favor of regularity.— It has been held, over and over again, that the actions of the departments of government, and especially of those officers clothed with the responsibility and duty of properly disposing of the public lands under the law, are presumed to have been correctly performed. As was said by the supreme court of the United States in a leading case: "The officers of the land department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the president. It may also

[1] Rogers v. Lukens, 6 L. D. 111; Henry W. Fuss, 5 L. D. 167, 169, citing Minor v. Marriott, 2 L. D. 709; Robb's Lessee v. Irwin, 15 Ohio, 703; Ohio Life & Trust Co. v. De Bolt, 16 How. 432; Gelpcke v. Dubuque, 1 Wall. 206. See also Sec'y Noble to Com'r Stone, 9 L. D. 86; Mary R. Leonard, id. 189; John M. Lindback, id. 284; Hessong v. Burgan, id. 353.

[2] White v. Sullivan, 2 L. D. 283.

[3] Francis M. Bishop, 5 L. D. 429. See also Original Co. v. Winthrop, 60 Cal. 631.

be and probably is true, that the courts may furnish, in proper cases, relief to a party where new evidence is discovered, which, if possessed and presented at the time, would have changed the action of the land officers; but, except in such cases, the ruling of the department on disputed questions of fact made in a contested case must be taken, when that ruling is collaterally assailed, as conclusive."[1]

§ 600. Binding force of the decisions of the department upon questions of fact, or upon mixed questions.—Pursuing the same line of thought, inasmuch as the various departments of government are functionaries, within their particular spheres, for the execution of the laws; and particularly, the land department is a special tribunal organized for the purpose of providing an orderly and systematic channel for the disposition of the public lands, it has become so well settled as to be axiomatic that the decisions of the department upon questions of fact, or of mixed questions of law and fact, in the absence of fraud or imposition, and if done within the scope of its authority under the law, and especially in matters pertaining to the issuance of patent, are not open to collateral attack, but only by special proceedings instituted for that purpose.[2] The reason of this

[1] Shepley v. Cowan, 91 U. S. 330. See also Rancho Casmalia, 2 L. D. 465; Murray B. Patten, id. 242; Sec'y Teller to Com'r McFarland, id. 606, 610; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Steel v. St. Louis S. & R. Co., 106 U. S. 447; Johnson v. Towsley, 13 Wall. 72; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038.

[2] Steel v. St. Louis S. & R. Co., 106 U. S. 447, 451; Lee v. Johnson, 116 U. S. 51; Noble v. Union River R. R. Co., 147 U. S. 175; Astizaran v. Santa Rita M. Co., 148 U. S. 83; Barden v. Northern Pacific R. R. Co., 154 U. S. 288; Bishop of Nesqually v. Gibbon, 158 U. S. 106; Holmes v. State, 100 Ala. 295, 14 So. Rep. 52; Saunders v. Purisima Land Co., 125 Cal. 163, 57 Pac. Rep. 658; Gale v. Best, 78 Cal. 238, 20 Pac. Rep. 551; Poire v. Wells, 6 Colo. 408. A further collection of authorities on this matter will be found in the discussion as to the effect of a patent, *post*, Part X, ch. V. See also Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038.

rule is well stated by the supreme court of the United States, speaking through Mr. Justice Field, in the following words: "It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the land department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or, where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in proper proceedings, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled."[1]

§ 601. Contemporaneous construction of the statutes by the department.— It is a well settled principle of statutory construction that wherever a statute is of doubtful import, the construction placed upon it by those who are called upon to construe it is of persuasive if not controlling force.[2] Upon this principle it has become well settled with reference to department rulings that the construction placed upon the statute by executive officers will not be overruled except for cogent reasons.[3] The doctrine is thus announced by the supreme court of the United States: "The principle

[1] Quimby v. Conlan, 104 U. S. 420, 426. See also Johnson v. Towsley, 13 Wall. 72; Shepley v. Cowan, 91 U. S. 330; Moore v. Robbins, 96 U. S. 530; United States v. Moore, 95 U. S. 760; Craig v. Leitensdorfer (Downs v. Hubbard), 128 U. S. 189, 31 L. ed. 114. See also Rose's notes to U. S. Rep., vol. 10, p. 195.

[2] Suth. Stat. Const., § 307 and cases cited.

[3] United States v. Moore, 95 U. S. 760; Hahn v. United States, 107 U. S. 406; Hastings, etc. Ry. Co. v. Whitney, 132 U. S. 366; McConnaughy v. Pennoyer, 43 Fed. Rep. 208; St. Paul, etc. R. Co. v. Sage, 71 Fed. Rep. 32; Northern Pac. Ry. Co. v. Dudley, 85 Fed. Rep. 82; Doe v. Waterloo M. Co., 70 Fed. Rep. 468; Montana Co. v. Clark, 42 Fed. Rep. 626.

that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."[1]

[1] Pennoyer v. McConaughy, 140 U. S. 1.

CHAPTER II.

OF THE SECRETARY OF THE INTERIOR AND HIS SUPERVISORY CONTROL OF THE DEPARTMENT.

§ 604. Secretary represents the president — General supervision of department.
605. Full authority in all matters pertaining to public lands and mines.
606. Acts of assistants lawful, but bound by rules.
607. Vested with reasonable discretion.

§ 604. Secretary represents the president — General supervision of department.— The very nature of our government in its constitutional elements implies that the various departmental secretaries are the advisors and coadjutors of the president. This principle has been recognized and followed both by the actions of the different executive departments and by the various courts of the land in many decisions from the beginning of the government to the present time. It therefore follows that the acts of the heads of the departments within the scope of authority given by law are regarded as the acts of the president.

The supreme court of the United States say: "The president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."[1] And he is presumed to assent to the acts of the secretary of the interior.[2]

By law of congress, the secretary of the interior is charged with the supervision of many subjects of public interest, including the public lands and mines.[3] His official duty, therefore, in this regard may be said to be not merely ministerial

[1] Wilcox v. Jackson, 13 Pet. 498; Instructions Land Department, 5 L. D. 520, 524. See also Wolsey v. Chapman, 101 U. S. 755; Williams v. United States, 1 How. 290.

[2] Sec'y Muldrow to Commissioner, March 29, 1887, 5 L. D. 520, 523, 524.

[3] R. S. U. S. 441; Johnston v. Morris, 72 Fed. Rep. 890, 897; Johnson v. Towsley, 13 Wall. 72; Circular of

in character, but it is to a large extent judicial in its nature.[1] Whence follows the rule, long recognized, that in respect to those matters committed to the charge of the department, being called upon as he is to exercise judgment and discretion, his decisions are not only exempt from collateral attack, but, if made within the scope of his authority, are absolutely final, conclusive and binding.[2]

§ 605. Full authority in all matters pertaining to public lands and mines.— It thus appears that congress has confided plenary authority under the law to the secretary of the interior with reference to public lands and mines.[3] Naturally and necessarily, as we have intimated, this involves the right of reviewing by appeal, or otherwise, all actions of subordinate officials coming to the secretary in a lawful way.[4] While he may correct errors of the subordinate officers in the proper case,[5] he may not review nor set aside the actions of his predecessors in office except for cogent reasons, such as would induce a court to overrule its own decisions.[6] In other words, he is bound by the general doctrine *stare decisis*, and may not authorize an unlawful act.[7]

§ 606. Acts of assistants lawful, but bound by rules.— Since the secretary is authorized to employ certain assistants, and congress has by law created others for him, and

Instructions Sec'y Noble, 1891, 13 L. D. 9, 13; William E. Dargie, 18 L. D. 277, 279; Baca Float No. 3, 13 L. D. 624; Cosmos Exp. Co. v. Gray Eagle Oil Co., 104 Fed. Rep. 20–43.

[1] James Brittin, 4 L. D. 441, 443.

[2] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Johnson v. Towsley, 13 Wall. 72; Quimby v. Conlan, 104 U. S. 420; Steel v. St. Louis S. & R. Co., 106 U. S. 447; Vance v. Burbank, 101 U. S. 514; French v. Fyan, 93 U. S. 172.

[3] See authorities in last preceding section; Stephen Sweayze, 5 L. D. 570; Knight v. United Land Ass'n, 142 U. S. 161.

[4] Chas. W. Filkins, 5 L. D. 49; Pueblo of San Francisco, id. 483; Knight v. United Land Ass'n, *supra*.

[5] F. W. Hawes et al. (on review), 5 L. D. 438, 439.

[6] Pueblo of San Francisco, *supra*; United States v. Stone, 2 Wall. 535.

[7] Id. See also Montana Improvement Co., 4 L. D. 65, 67.

they are vested by law and by rule with certain fixed authority, it necessarily follows that the decisions of the acting secretary[1] and the decisions of an assistant[2] have the same force and effect as if made by the secretary himself, in proper cases. Ours is a government of laws, and the heads of the departments are bound by the laws the same as the humblest citizen; and even though the execution of a law be confided to the president, or through him to the heads of departments, they are none the less bound to execute the laws. And while a reasonable discretion is sometimes vested, he cannot evade its ultimate execution; and since, as we have seen, the rules of the department have, for the time being, the force and effect of law, it follows that he has not the right to suspend the rules of procedure, so provided for the ultimate decision of matters before the department.[3] His supervisory powers can in general only be invoked in one way, and that is by regular appeal.[4]

§ 607. Vested with reasonable discretion.— It seems quite apparent from what we have said that the secretary of the interior, within the general scope of the duties of his office, likewise within the limits prescribed in special matters committed to his care, is vested with a reasonable discretion, not a mere whim or caprice, however, but a sound legal discretion. As was said by the supreme court of the United States: "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he

[1] Rees v. Central Pac. R. Co., 5 L. D. 277.

[2] Frost v. Wenie, 9 L. D. 588.

[3] William E. Dargie, 13 L. D. 277, 279; Rees v. Central Pacific R. R. Co., 5 L. D. 277.

[4] Henry C. Putnam, 5 L. D. 22. Compare Knight v. United Land Ass'n, 142 U. S. 161.

does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future."[1]

[1] United States v. Macdaniel, 7 Pet. 1-14; Circular of Instructions by Sec'y Noble, July 8, 1891, 13 L. D. 9, 17. See also Butterworth v. Hoe, 112 U. S. 50.

CHAPTER III.

OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

§ 610. Commissioner, office, when created — Duties of office — The statute.
611. General supervisory authority of — Regulations.
612. Has general authority and his actions are judicial.
613. May investigate conditions in adverse suits and decide whether either party is entitled to patent notwithstanding judgment.
614. Miscellaneous matters — Decision by acting commissioner.

§ 610. Commissioner, office, when created — Duties of office — The statute.— The general land office was originally established by the act of April 25, 1812, as a bureau of the department of the treasury,[1] and the office of commissioner was created by act of 1836,[2] the entire bureau becoming a part of the department of the interior upon the creation of that department in 1849.[3] The duties of the office, in a general way, are provided for by the following comprehensive section of the law: "The commissioner of the general land office shall perform, under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."[4]

[1] Act of April 25, 1812, 2 Stat. at L. 715.

[2] Act of July 4, 1836, 5 Stat. at L. 107; R. S. U. S. 446; Instructions General Land Office, July 8, 1891, 18 Stat. at L., p. 18.

[3] Act of March 3, 1849, 9 Stat. at L. 395; R. S. U. S. 437, 18 L. D., p. 13; Johnston v. Morris, 72 Fed. Rep. 890.

[4] R. S. U. S. 453.

§ 611. General supervisory authority of—Regulations.—Necessarily, as the head of his particular department, he may, with the consent and approval of the secretary of the interior, make and enforce such reasonable rules as are necessary to carry into effect statutes, and for the performance by subordinates of their respective duties, and such acts are, in contemplation of law, the acts of the secretary of the interior.[1]

§ 612. Has general authority, and his actions are judicial.—The jurisdiction of the commissioner of the general land office is that of an intermediate supervisor over the acts of registers and receivers and surveyors-general under the law, rules and regulations of the department, and this supervisory jurisdiction is an appellate one;[2] and while the actions of the commissioner in passing upon such matters have all the force and effect of judicial decisions,[3] he is likewise vested with the same judicial discretion within his sphere as is the secretary of the interior.[4]

§ 613. May investigate conditions in adverse suits and decide whether either party entitled to patent, notwithstanding judgment.—Since it is settled law, from the very nature and jurisdiction of the department, that it must finally determine when, and under what circumstances, the government shall part with its land, including its mineral land,[5] and since the judgment roll in an adverse suit can only deter-

[1] Hooper v. Ferguson, 2 L. D. 712, 714; Wolsey v. Chapman, 91 U. S. 755, 769; John C. Turpin, 5 L. D. 25, 27; Com'r McFarland to Aberdeen Office, 1 L. D. 45.

[2] John McDonogh School Fund, 8 L. D. 463, 466; Chas. W. Filkins, 5 L. D. 49; Adolph Peterson, 6 L. D. 371; Sam'l H. Vandevoort, 7 L. D. 86; Stephen Sweayze, 5 L. D. 570; Instructions March 3, 1891, 13 L. D. 3, 13; Dippert v. Berger, 13 L. D. 496; Bell v. Hearne, 19 How. 262; Barnard v. Ashley, 18 How. 43; Baca Float, 13 L. D. 624; R. S. U. S. 453.

[3] Morrison v. McKissick, 5 L. D. 245, 247.

[4] Gibson v. VanGilder, 9 L. D. 626; David B. Emmert, 3 L. D. 55; Stiles v. Newman, 10 L. D. 491.

[5] Moore v. Robbins, 96 U. S. 530; Alice Placer Mine, 4 L. D. 314.

mine after all the matters before the court, and the decision can only specify who, if either, has complied with the law and is entitled to possession,[1] it has been decided by the department, in a very able opinion by the late Secretary Lamar, and correctly we think, that the commissioner of the general land office, in virtue of his supervisory authority and in the due discharge of his duties under the law, has the right to go behind the judgment roll in an adverse suit, not for the purpose of reversing or setting aside anything decided there, but for the purpose of deciding after all, whether, from matters brought to his notice *dehors* the judgment roll, the applicant, or either applicant, is entitled to a patent.[2]

§ 614. Miscellaneous matters — Decision by acting commissioner.—Manifestly, and for the reasons already noticed, it is the officer and not the person who makes the decision. Whence it follows that wherever the acting commissioner is acting in the place of the commissioner, his decisions are entitled to the same respect as those of the commissioner.[3] The department is likewise authorized to employ special agents for certain purposes, but it is very rarely that this is done with respect to mining property, and it is therefore unnecessary to notice it further at this time, as the authority of such agents is merely that of collecting ocular evidence by visiting the property, and is limited to the particular matter in hand. But he should not examine claims and report thereon at the request of interested parties.[4]

[1] Branagan v. Dulaney, 3 L. D. 744.
[2] Alice Placer Mine, 4 L. D. 314.
[3] John M. Walker, 5 L. D. 504.
[4] Sylvanus P. Bartlett, 14 L. D. 38.

CHAPTER IV.

SURVEYOR-GENERAL.

§ 620. Surveyor-general — Appointment and duties.
621. His deputies and their appointment — Discretionary powers.
622. Neither deputy mineral surveyors nor clerks in the office may be interested in acquiring patent to lands within their district.

§ 620. Surveyor-general — Appointment and duties.— While the surveyor-general is appointed by the president, he is essentially a subordinate and under the control of the commissioner of the general land office.[1] He is amenable to the department and is bound to follow the circular of instructions issued for his guidance.[2] While his official actions are presumably and *prima facie* correct, they are subject to review by appeal, and may be set aside by the commissioner, or on appeal to the secretary of the interior.[3]

§ 621. His deputies and their appointment — Discretionary powers.— Manifestly and essentially, in the discharge of his duty in a competent manner, the surveyor-general should be and is vested with a wide discretion in respect to the appointment of deputy mineral surveyors.[4] And while it is not absolutely essential that a deputy mineral surveyor be a resident of the district in which he is appointed,[5] the commissioner will not interfere with the action of the surveyor-general in refusing to appoint a non-resident

[1] R. S. U. S. 441, 453. See also § 2207 *et seq.*; State of California, 3 L. D. 492, 495.

[2] State of California, *supra*.

[3] Snyder v. Sickels, 98 U. S. 203; Magwire v. Tyler, 1 Black, 195; Patterson v. Tatum, 3 Sawy. 164; Magwire v. Tyler, 8 Wall. 661; State of California, *supra;* Lytle v. Arkansas, 9 How. 333; Barnard's Heirs v. Ashley's Heirs, 18 How. 43; Robert Golinski, 20 L. D. 283.

[4] William E. Jacobs, 21 L. D. 379; R. S. U. S., § 2334.

[5] Chas. W. Helmick, 20 L. D. 163; Richard H. Brown, 27 L. D. 582.

of his district as deputy mineral surveyor, or in refusing to reinstate a non-resident who had previously held such appointment.[1] But the general supervisory power of the commissioner is a sufficient warrant for reviewing the action of a surveyor-general, including the right to restore a deputy mineral surveyor suspended by a surveyor-general.[2]

§ 622. Neither deputy mineral surveyors, nor clerks in the office, may be interested in acquiring patent to lands within their district.— No man should be judge of his own case. And, proceeding upon this principle, as well as from considerations of the soundest public policy, it is well settled that neither deputy mineral surveyors nor clerks in the surveyor-general's office are qualified to locate and acquire patents to public mineral lands.[3] By provision of the statute,[4] officers and clerks of the department in general, that is to say, the general land office, are prohibited from directly or indirectly purchasing, or being interested in the purchase of, any public lands; and this has been correctly decided to include within its spirit any officers, clerks or employees in any branch of the public service under the control and supervision of the commissioner of the general land office, and to extend to all officers, clerks and employees of the surveyors-general and the local land offices.[5]

[1] Richard H. Brown, 27 L. D. 582; William E. Jacobs, 21 L. D. 379.

[2] Robert Golinski, 20 L. D. 283.

[3] Floyd v. Montgomery, 26 L. D. 122; John S. M. Neill, 24 L. D. 393; Muller v. Coleman, 18 L. D. 394; Herbert McMicken, 10 L. D. 97; s. c., 11 L. D. 96.

[4] R. S. U. S. 452.

[5] See authorities in note 8, *ante*. See also Circular of Sept. 15, 1890, 11 L. D. 348.

CHAPTER V.

REGISTERS AND RECEIVERS.

§ 626. Relative duties of register and receiver considered and discussed — Their appointment.
627. In respect to facts, they act in a judicial capacity, not controlled by the courts.
628. Must in general do business at the regular land office.

§ 626. Relative duties of register and receiver considered and discussed — Their appointment.— Registers and receivers are appointed by the president.[1] The term of office is nominally four years, but really during the pleasure of the president. They are required to reside at the place where the land office is kept,[2] and are paid a salary of $500 a year and certain fees.[3] As intimated in previous sections, they are under the control of the commissioner of the general land office and the secretary of the interior.[4] The duties of register and receiver are necessarily distinct.[5] They are expected, and indeed it is their duty, to co-act and pass upon all matters brought before them in an official way.[6] Neither can act for the other[7] without express authority, but may do so then.[8] But their acts and duties are so interdependent that a vacancy disqualifies the remaining incumbent for the duties of his own office during the vacancy.[9]

[1] R. S. U. S., § 2234.

[2] R. S. U. S., § 2235.

[3] R. S. U. S., §§ 2237, 2238.

[4] Floyd v. Montgomery, 26 L. D. 122, 128; Knight v. United Land Ass'n, 142 U. S. 162.

[5] Paris Meadows, 9 L. D. 41, 45.

[6] C. F. Ebinger, 1 L. D. 150; Dean Richmond Lode, id. 545.

[7] Christian F. Ebinger, *supra;* Instructions, 5 L. D. 368.

[8] Dean Richmond Lode, 1 L. D. 545; Graham v. Carpenter, 9 L. D. 365, 368; Armstrong v. Moranda, 14 L. D. 133.

[9] Armstrong v. Moranda, *supra;* Williams v. Loew, 12 L. D. 297; Smith v. McCarrecher, 20 L. D. 276; Paris Meadows, *supra.*

By this it is not meant, however, that they are required to sit together at the same time, and concurrently to pass upon matters brought before them;[1] it is sufficient that the matter is brought to the attention of each, and each may perform the functions of his own office without consulting the other.[2]

§ 627. In respect to facts, they act in a judicial capacity, not controlled by the courts.— All evidence in contested cases before the register and receiver is required by the rules of the department, which is the manual of procedure for their guidance, to be taken down by question and answer in the form of a deposition. Objections made to evidence are likewise required to be taken down; and while they are nominally passed upon by the register and receiver, in making up their decision all evidence, including that objected to, is allowed to go in the record and held for the consideration of higher officers in case of an appeal. In passing upon matters before them, from the very nature of things they are vested with the right to exercise judgment and discretion, from which it follows that courts may not direct how and in what manner they shall exercise it. Being agents of the department, they must obey the law and instructions laid down for their guidance, in respect to which they cannot be interfered with by the courts.[3] Their decisions are open to review and to be set aside by the commissioner or the secretary of the interior,[4] but are final and conclusive if not appealed from.[5]

[1] Potter v. United States, 107 U. S. 126.

[2] Id. See also Smith v. McCarrecher, 20 L. D. 276.

[3] Litchfield v. Register & Receiver, 1 Woolw. 299, 15 Fed. Cas., p. 592, No. 8,388, citing Marbury v. Madison, 1 Cranch, 137; Kendall v. United States, 12 Pet. 608; State of Mississippi v. Johnson, 4 Wall. 475. See also McIntire v. Wood, 7 Cranch, 504; McClung v. Silliman, 6 Wheat. 598; Koehler v. Berrin, 25 Fed. Rep. 161.

[4] Floyd v. Montgomery, 26 L. D. 122; Knight v. United Land Ass'n, 142 U. S. 163; Hosmer v. Wallace, 47 Cal. 461; Barnard's Heirs v. Ashley's Heirs, 18 How. 45; Rush v. Valentine, 12 Neb. 518.

[5] United States v. Marshall S. M. Co., 129 U. S. 579; Craig v. Leidens-

§ 628. Must in general do business at the regular land office.— An orderly and seasonable attention to business requires that they have regular office hours and perform the duties of their office thereat.[1] But it does not follow that business done elsewhere is invalid or illegal, or that they may not receive an application at another place.[2] The department has furnished certain rules of practice and the register and receiver may not waive them,[3] but manifestly these rules are for the general guidance of the register and receiver, and, as we have already seen, they cannot deprive an applicant of a statutory right.[4] Thus, for instance, the statute allows an adverse claim to be filed within the sixty days' period of publication. This does not mean the office hours of sixty days, but just what it says — sixty full days; and in respect to this particular right we apprehend that it would not only be lawful, but it would be the duty of the register to receive and file, at any place he might be found, an adverse claim on the last day of the notice.[5]

dorfer, 128 U. S. 189; Seymour v. Fisher, 16 Colo. 188, 27 Pac. Rep. 240; Chas. Hoffman, 4 L. D. 92; Phillip Mannheim, id. 197.

[1] See *ante*, § 597, p. 535, note 6. See also Richard L. Burgess, 18 L. D. 14.

[2] Sears v. Almy, 6 L. D. 1; John W. Nicholson, 9 L. D. 54; Clewell & Marsh, 2 L. D. 320; Stubblefield v. Honeyfield, 18 L. D. 543.

[3] Warren v. Field, 6 L. D. 286.

[4] *Ante*, § 598.

[5] See *post*, Part X, ch. II, art. B. See also Stubblefield v. Honeyfield, *supra*.

PART X.

OF THE APPLICATION FOR PATENT, ADVERSE CLAIMS AND SUITS, AND OF THE PATENT, ITS VALUE AND STRENGTH.

CHAPTER I.

OF THE SURVEY; AND HEREIN OF THE APPLICATION THEREFOR, THE GUIDING RULES AS TO SURVEY, AND THE RETURN OF THE SURVEYOR.

§ 635. Application for survey — Contents of — Copy of location notice.
636. Deposit in surveyor-general's office.
637. Employment of surveyor.
638. Rules governing survey — Conflicting surveys and claims — Particulars to be observed — Parallel end lines.
639. Mistakes of surveyor, effect of.
640. New survey — When will be required.
641. Not void for excess.
642. The surveyor's return — Identity of the claim — Boundaries changed.
643. Same — Five hundred dollars' improvements.
644. Approval certificate of surveyor-general.
645. Survey of placer.
646. Group applications and surveys.
647. Summary — The doctrine of this chapter restated.

§ 635. Application for survey — Contents of — Copy of location notice. — The first step in the proceedings to obtain a United States patent for mining ground is the application for a survey. This must be prepared and signed by the claimant or claimants or his or their attorney, or any one of several claimants on behalf of all, and addressed to the surveyor-general of the land district in which the ground is situated. Each application should contain —

1. The name or names of the claimant or claimants in full, as it is desired to appear in the application for patent.

2. The name of each location embraced in the application.

3. The names of the mining district, state and county in which the claim is located.

4. The name of the United States deputy mineral surveyor to whom it is desired the order shall be issued.[1]

The applicant must also furnish with the application a certified copy of the location notice; or, in case more than one claim is embraced in the application, then a copy of each location notice; likewise with copies of all addenda or amendments for the guidance of the surveyor making the survey. And the official survey must be in accordance with the record of the claim as thus appearing.[2]

§ 636. Deposit in surveyor-general's office.— At the time of receiving and filing the application for a survey, the surveyor-general may require a deposit sufficient to cover the expense of preparing plats and other office work under the rules. He must, if required by the applicant, furnish an estimate of such expenses; the applicant must thereupon deposit this amount with such United States depositary as may be designated, for which he is given receipts executed in triplicate.[3] The amount of such deposit, of course, should be reasonable, and an applicant will not be required to deposit as large an amount in case of an amend-

[1] Regulations of General Land Office, June 1, 1892, revised to July 26, 1901. Upon filing application substantially as above outlined, the claimant is entitled to have the claim surveyed and platted under the direction of the surveyor-general. Com'r to Reg. & Rec. Sacramento, July 27, 1880, Copp's Min. Lands, 281. And he is entitled to as many orders for survey as he applies and pays for. Com'r McFarland to Surveyor-General Mason, October 8, 1881, Copp's Min. Lands, 307, 308.

[2] Lincoln Placer, 7 L. D. 81; Sulphur Mine, 5 C. L. O. 100; Philip Dephanger, 1 L. D. 581; Rose Lodes Nos. 1 and 2, 22 L. D. 88; Com'r to Surv. Gen. of Idaho, Nov. 24, 1891; Com'r to Surv. Gen. of Arizona, Oct. 31, 1891; Cir. Nov. 20, 1873, Copp's Min. Lands, 58; Com'r to Surv. Gen. of Colorado, Aug. 31, 1877, Copp's Min. Lands, 220; Sec'y Schurz to Com'r, Copp's Min. Lands, 230.

[3] Land Office Cir., June 24, 1899, sec. 93.

ment as in the case of an original survey.[1] Money so deposited may not be refunded, although unexpended, but may be applied on other surveys if desired by the applicant.[2] Certificates for money so deposited are not assignable.[3]

§ 637. Employment of surveyor.— The claimant may employ any deputy mineral surveyor within such district to perform the work of surveying the claim, and it is the duty of the surveyor-general to issue the order accordingly.[4] The fee or compensation of such deputy is a private matter between the parties and has nothing to do with the deposit.[5]

§ 638. Rules governing survey — Conflicting surveys and claims — Particulars to be observed — Parallel end lines.— The following particulars must be observed in the survey of a mining claim:

1. The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on it, in each direction from the point of discovery, or other well-defined place on the claim, should be represented on the plat and in the field-notes.

2. The intersection of the lines of the survey with the lines of conflicting prior surveys.

3. Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict.

4. The total area of the claim embraced by the exterior boundaries, and also the area in conflict with each intersecting survey.[6]

[1] Montana M. & Red. Co., 16 C. L. O. 269; G. B. Foote, 2 L. D. 773; Com'r to Surv. Gen. California, Jan. 2, 1892.

[2] Elijah M. Dunphy, 8 L. D. 102; Com'r to G. W. Parks, July 13, 1896.

[3] Com'r to G. W. Parks, July 13, 1896.

[4] Gen. L. O. Cir., June 24, 1899, par. 92; Cir. Instructions, June 1, 1892, revised to 1895.

[5] Geo. B. Foote, 2 L. D. 773.

[6] Gen. L. O. Cir., June 24, 1899, par. 43.

5. If the claim is situated within two miles of any corner of a public survey, the plat and field-notes must show a line connecting the claim with such corner; if there be no such corner within two miles, it must be connected with a United States mineral monument.[1]

6. All conflicts with prior surveys must be shown, but need not necessarily be excluded;[2] though whether they are included or excluded should be stated.

7. The end lines of each claim embraced within the survey must be made parallel. While this requirement has been held to be merely directory,[3] the better line of thought is to the contrary, and the better practice requires it, for the reason that subsurface rights are thereby better protected;[4]

[1] Gen. L. O. Cir., June 24, 1899, par. 41; Acting Com'r Armstrong to Reg. & Rec. at Bodie, California, Oct. 20, 1879; Copp's Min. Lands, 259. As to what constitutes a public survey, see Hanck John C., 10 L. D. 391; Eugene McCarthy, 14 L. D. 105. But a patented mining claim has been held not to be a public survey. Commissioner to J. A. Robinson, April 23, 1891, In re Lake Mine. As to mineral monument, see Commissioner to Surv. Gen. S. Dak., March 10, 1893; George S. Dodge, 6 C. L. O. 122; Sulphur Springs Quicksilver Mine, June 18, 1892; Senator Mill Site, 7 L. D. 475; Commissioner to Surv. Gen. Montana, Oct. 27, 1891; Same to Surv. Gen. of Utah, April 10, 1891. When the corner of a public survey cannot be found after diligent search, the claim may be connected with a mineral monument. Com'r to Surv. Gen. of Nevada, May 26, 1892.

[2] L. O. Cir., June 24, 1899, par. 43; Thor Mine, 5 C. L. O. 51; Cir. Nov. 16, 1892, 1 L. D. 693; Grand Dipper Lode, 10 C. L. O. 240; J. H. Russel Lode, 5 id. 18, Copp's Min. Lands, 221; Commissioner to Surv. Gen. Montana, March 27, 1880. The surveyor-general has not the power to compel the exclusion of a conflict. Antedeluvian Lode, 8 L. D. 602. See also Big Flat G. M. Co. v. Big Flat Gravel M. Co., Sec. Schurz to Com'r Williamson, Jan. 8, 1881, Copp's Min. Lands, 299; J. H. Nolan, 9 C. L. O. 230.

[3] Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S. 196; Elgin M. & S. Co. v. Iron Silver M. Co., 14 Fed. Rep. 877; Montana Co. v. Clark, 42 Fed. Rep. 626; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819; Carson G. & S. M. Co. v. North Star M. Co., 83 Fed. Rep. 658, 28 C. C. A. 333, affirming 73 Fed. Rep. 597; Walrath v. Champion M. Co., 63 Fed. Rep. 552; Doe v. Sanger, 83 Cal. 203, 23 Pac. Rep. 365; Wolfley v. Lebanon M. Co., 4 Colo. 112, 116; Breece M. Co., Sec'y Teller to Commissioner, July 16, 1884, 3 L. D. 11.

[4] Doe v. Sanger, 83 Cal. 203, 23

and for the purpose of so making them the surveyor has the right, if in accordance with the location notice, to extend the lines within, upon or across patented or unpatented mining,[1] agricultural or town-site claims owned by others;[2] the area thus brought in conflict being excluded, except for the purpose of establishing parallel end lines and defining extra-lateral rights.[3]

§ 639. **Mistakes of surveyor, effect of.**— The applicant for patent cannot be injured by the mistakes of the deputy mineral surveyor. In case of such error the deputy surveyor is bound to correct the same at his own expense.[4] The commissioner of the general land office has, in one instance at least, held that where mistakes made by a deputy surveyor are not discovered until he has ceased to hold that position, the applicant must bear the expense of an amended survey.[5] Undoubtedly what the learned commissioner meant by this decision is, that after the deputy has gone out of office the department has no authority over him to compel him to correct his mistakes. To this extent there is nothing wrong with the decision. Nor can the occupant miner be injured by the failure of the surveyor to segregate mineral from agricultural land.[6]

§ 640. **New survey — When will be required.**— A new survey in lieu of an incorrect or erroneous one will be or-

Pac. Rep. 865; Doe v. Waterloo Min. Co., 54 Fed. Rep. 935; Philadelphia v. Pride of the West, 3 C. L. O. 82.

[1] Haidee Gold Mining Co., 30 L. D. 420; Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55.

[2] Alice Lode, 30 L. D. 481; Del Monte M. & M. Co. v. Last Chance M. & M. Co., *supra*.

[3] See *ante*, note 1.

[4] Basin M. & Concent. Co. v. White, 22 Mont. 147, 55 Pac. Rep. 1049; Golden Reward M. Co. v. Buxton M. Co., 79 Fed. Rep. 688; Com'r McFarland to Surveyor-General of Montana, Copp's Min. Lands, 304, 308; Com'r to Surveyor-General of Colorado, April 3, 1895, July 30, 1895; Edward Hickey, 9 C. L. O. 168; Com'r to Surveyor-General of San Francisco, 5 C. L. O. 162; Prince of Wales v. Highland Chief, 2 C. L. O. 2, Copp's Min. Lands, 162, 165.

[5] Com'r to Surv. Gen. of Montana, Dec. 10, 1891.

[6] Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 504.

dered before a patent will be issued upon it.[1] But since the applicant is responsible for all costs of survey, the surveyor-general may not order an amended or re-survey without first consulting his wishes; the most he can do is to disapprove the survey as made.[2] Where an amended survey is required, the applicant should be allowed a reasonable time to take the proper steps.[3]

§ 641. Not void for excess.— The application should not be canceled, nor the location held to be void, by reason of an area in excess of that allowed by statute being innocently included in the description as contained in the location notice.[4] While a surveyor is not permitted in his survey to alter the bounds as shown by the location notice, yet he may "cast off the area in excess of the statutory limit by moving the monuments and stakes." It is not material that the lines made by the surveyor do not exactly correspond with those made by the locator, since the latter is often compelled to estimate courses and distances, whence an accurate result is impossible.[5]

§ 642. The surveyor's return — Identity of the claim — Boundaries changed.— The return of the surveyor consists of his field-notes of the survey and also proof of the identity of the claim and of the improvements thereon. This return must show every line crossed by the survey and every conflict disclosed by it.[6] He may not rely solely upon the record or certificate of location, but must require proof of the identity of

[1] United States v. Rumsey, 22 L. D. 101.

[2] Com'r McFarland to Surv. Gen. of Montana, Copp's Min. Lands, 808.

[3] Vanderbilt Lode, 16 L. D. 105; Lincoln Placer, 7 L. D. 81.

[4] *Ante*, Part VII, ch. III.

[5] Doe v. Sanger, 83 Cal. 203, 23 Pac. Rep. 365; Howeth v. Sullinger, 118 Cal. 547, 45 Pac. Rep. 841. See also In re Empy, 10 C. L. O. 102.

[6] Commissioner to Surveyor-General of Colorado, 15 C. L. O. 255; Commissioner to Surveyor-General of Arizona, Oct. 31, 1891; Commissioner to Surveyor-General of Nevada, 1 L. D. 581; Philip Dephanger, Copp's Min. Lands, 330; Commissioner to Surveyor-General of Colorado, Copp's Min. Lands, 276.

the claim by the affidavits of two disinterested witnesses; and he must return such proof.[1] But the ground surveyed must substantially agree with the ground located and staked; and in the absence of a showing that the stakes have been moved, the marks thus made upon the ground are controlling.

§ 643. Same — Five hundred dollars' improvements.— The return must also contain a certificate by the surveyor that improvements of not less than five hundred dollars in value have been placed on the claim, in which certificate such improvements must be accurately defined and described, and the value of each improvement separately stated.[2] If at the time of the survey the value of the improvements is less than five hundred dollars, this certificate may be filed at any time before completion of publication.[3] Generally, whatever will satisfy the statute requiring annual labor may be classed as improvements under this requirement.[4] And improvements, like annual labor, where done outside the claim but tending in fact to develop it, will be classed as improvements the same as if done on the claim itself.[5] But where a tunnel is run through an adjoining claim, not the property of the applicant, and without the consent of the owners, it will not be classed as improvements on the claim.[6] It has been held by the commissioner of the land office, in at least two cases, that a relocator may not adopt the improvements of a former

[1] Gen. L. O. Cir. "N," Sept. 28, 1882.

[2] Gen. L. O. Cir., June 24, 1899, par. 53; Morr. Min. Rights (10th ed.), p. 349; Surv. Gen. Rules, 88 to 43; Commissioner to Reg. & Rec. Bodie, Cal., Copp's Min. Lands, 269; Commissioner to Surveyor-General, 1 C. L. O. 2; J. H. Russell Lode, Copp's Min. Lands, 231.

[3] R. S. U. S., § 2325; Milton v. Lamb, 23 L. D. 539; White Cloud M. Co., id. 252; Little Pet Lode, 4 L. D. 17; Draper v. Wells, 25 L. D. 550; Floyd v. Montgomery, 26 L. D. 122; Surv. Gen. Rule No. 46; L. O. Cir., *supra*, par. 23.

[4] On the question of annual labor and what constitutes, see *ante*, § 582. See also Surv. Gen. Rule 39; Emily Lode, 6 L. D. 220, 222; Adams v. Quijada, 25 L. D. 24.

[5] Com. to Reg. & Rec. Bodie, Cal., Copp's Min. Lands, 260; John Downs, 7 L. D. 71; Tricky Placer, id. 52; Emily Lode, *supra*.

[6] Headlight Lode, Copp's Min. Lands (2d ed.), 260.

locator.[1] The reason for which is that he did not make them.

While the decisions of the land department are not in entire harmony on this question,[2] it would seem that the law contemplates the expenditure of five hundred dollars for each claim, where several are entered in one group.[3]

§ 644. **Approval certificate of surveyor-general.**— The surveyor-general must certify the plat in duplicate, after the same is prepared in his office, with the amount of work done thereon,[4] which certificate establishes *prima facie* that fact, the correctness of the survey, and the mineral character of the land.[5]

§ 645. **Survey of placer.**— The Revised Statutes of the United States provide that where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required.[6] But where they cannot be made to conform to legal subdivisions, then it is necessary to survey and plat them, the same as unsurveyed lands.[7] If upon surveyed lands, reasons by affidavit must be shown why it does not conform to legal subdivision.[8] Where the placer contains a lode known to exist, that lode must be described in the survey and shown by the return.[9]

[1] Commissioner to Max Boehmer, Copp's Min. Lands, 300; to Wm. A. Arnold, id. 161.

[2] Cir. Letter "N" of Department, March 14, 1898; Bliss to Wolcott, 27 L. D. 91–95, citing Lindl. Mines, sec. 673; Gen. L. O. Cir., June 24, 1899, par. 53; Sweeney v. N. P. R. R. Co., 20 L. D. 294; Ferguson v. Hanson, 2 L. D. 836; Good Return M. Co., 4 L. D. 221.

[3] United States v. Iron Silver M. Co., 128 U. S. 673; s. c., 24 Fed. Rep. 568; Andromeda Lode, 13 L. D. 146; Gen. L. O. Cir., June 24, 1899, par. 53.

[4] R. S. U. S., § 2325; L. O. Cir., June 24, 1899, par. 42.

[5] Russell v. Maxwell Land Grant Co., 158 U. S. 253; Colo. Fuel Co. v. Maxwell Land Grant Co., 22 Colo. 71, 43 Pac. Rep. 556; Serrano v. Rawson, 47 Cal. 52; Cragin v. Powell, 128 U. S. 691; Beard v. Federy, 70 U. S. 492.

[6] R. S. U. S., § 2331. But see G. A. Khern, 6 L. D. 580.

[7] Id.; Gen. L. O. Cir., June 24, 1899, par. 60; Pearsall v. Freemin, 6 L. D. 227; Rosina v. Gerhauser, 7 L. D. 390.

[8] Pearsall v. Freeman, *supra;* S. P. R. Co. v. Griffin, 20 L. D. 487. See also Ferrell v. Hoge, 29 id. 12.

[9] R. S. U. S., § 2333; Surveyor-General's Rule 33; Gen. L. O. Cir., June 24, 1899, par. 32.

§ 646. Group applications and surveys.— Any number of contiguous locations belonging to the same party or parties, or in which there is community of interest, may be embraced in the same application and survey.[1] But such survey must, in conformity with the statutory requirements, distinguish the several locations and exhibit the boundaries of each.[2] And an entry may be refused if claims sought to be grouped are not contiguous.[3] It would seem necessary, also, that all the applicants should have some interest in each of the locations.

§ 647. Summary — The doctrine of this chapter restated.— The law outlined in the foregoing sections may be briefly summarized as follows:

There must be a formal application for a survey in writing, signed by the applicant, accompanied by certified copies of the location notice and of all amendments. But before the survey can be ordered there must be a deposit made of the estimated cost of the office work in the surveyor-general's office. This has nothing to do with the compensation to the deputy for field work, as that is a matter of private contract with the parties, as the applicant may employ any deputy of the district, and the order must be issued to him.

While the surveyor-general, by departmental rules, may order a resurvey to correct any mistakes, unless done by the surveyor who performed the work in the first instance, it will be at the expense of the applicant, the department not being in general responsible for the mistakes of the deputy.

[1] Surveyor-General's Rules, No. 9, July 6, 1897; Carson City G. & S. M. Co. v. North Star M. Co., 78 Fed. Rep. 597; affirmed (C. C. A.), 83 Fed. Rep. 658, 28 C. C. A. 383; St. Louis Sm. & Ref. Co. v. Kemp, 104 U. S. 636; Good Return M. Co., 4 L. D. 221; St. Louis Sm. & Ref. Co. v. Ray, 104 U. S. 657; Samuel E. Rogers, 4 L. D. 284; Champion M. Co., id. 362; Wm. DeWitt, 9 C. L. O. 34; F. N. Williams, 15 L. D. 532; Tucker v. Masser, 118 U. S. 203; Lakin v. Dolly, 58 Fed. Rep. 383; Poire v Wells, 6 Colo. 406.

[2] Surveyor-General's Rules, July 6, 1897, Nos. 23 and 33; S. F. Mackey, 5 L. D. 199; Golden Sun M. Co., 6 id. 808; Commissioner to Surveyor-General S. Dak., March 31, 1892.

[3] Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

The rules of the department prescribe certain requirements as to making the survey, which must be observed. But, independent of that, the law requires that the survey be made upon the lines of the original location; but where there is an excess it may be cast off and the survey finally made to conform to the lawful size of the claim. And the same rule applies to the statute requiring parallelism of end lines. These must be made parallel by the survey; and if in doing so it becomes necessary to cast off a portion of the claim staked this may be lawfully done.

The return of the surveyor should show all lines made, all bearing points, be tied to the public survey if the land is surveyed, otherwise to a mineral monument, and must show all previously surveyed lines crossed by the survey.

No survey of a placer need be made if located upon surveyed land, provided the claim conforms to legal subdivisions; otherwise it must be surveyed the same as a lode claim.

The owner of a group of contiguous locations may have all the claims surveyed under one number and platted as one group.

The return of the surveyor must also show the improvements made upon the claim intended to apply towards the five hundred dollars required by statute. This return may be made, however, at any time during the period of publication.

The surveyor-general must certify to the plat and deliver it to the applicant, and is entitled to the further fee permitted by the rules of his office, of a certain sum, generally five dollars, for each conflict with a previous survey.

The surveyor-general must also certify as to the five hundred dollars improvements, which certificate can be furnished as to this point at any time before completion of publication. But the diagram as posted on the claim and filed in the land office must be otherwise certified as correct.

CHAPTER II.

OF PROCEEDINGS IN THE LAND OFFICE.

ARTICLE A.

Of the Filing of Papers. Giving Notice and Final Entry.

§ 650. Order of filing — Application to follow with diligence.
651. Fees to be paid.
652. Posting notice and diagram on the claim — Consolidated claim.
653. What a sufficient posting — Conspicuous place.
654. Description of claim in notice — Conform to published notice — Adjoining claims — Must be posted before application.
655. List of papers to be filed with the application.
656. The application for patent — Its allegations of facts and general contents.
657. By whom and how application may be sworn to.
658. Citizenship, how proved.
659. Applications by trustees, executors, or administrators — Co-owners as trustees — Equitable interests.
660. Posting and publishing notice — Summons to all the world — Statute must be complied with.
661. How period of publication computed — Length of time in daily and weekly paper.
662. Where published — Reputable newspaper.
663. Final entry — Papers to be filed — After-acquired title — Successor in interest of applicant.
664. Receiver's receipt, when issued and to whom — Owner of title — Mortgagee.
665. Value and effect of receiver's receipt — Conclusive as to what, *prima facie* as to what — Assessment work after receiver's receipt.
666. Placer application — Lode in placer — Known lode — Effect of patent.
667. Known lode or vein in placer — Means of knowledge, and what sufficient knowledge.
668. Test of knowledge.
669. To whom notice or knowledge must come.
670. Time of knowledge — Sufficiency of allegation of knowledge.
671. Applications for mill sites.

§ 672. Application under the statute of limitations.
673. Effect of application for patent — Segregates land applied for from public domain.
674. Similarities of statute to Mexican law.

§ 650. Order of filing — Application to follow with diligence.— Applications for patent must be received in the order in which they are filed in the land office, without reference to the order of filing the application for survey with the surveyor-general.[1] A mere application, not followed by reasonable diligence in prosecuting the subsequent steps, will not indefinitely preserve the right of priority.[2] In this case an application was made and suspended by request of the applicant; and, pending the failure to proceed with the application and give notice accordingly, a junior conflicting survey was permitted to proceed.

§ 651. Fees to be paid.— Upon filing each application in the land office the applicant must pay a filing fee of ten dollars.[3] The cost of publishing the notice of application in a newspaper, as well as all other costs and fees necessary to be paid in the matter of the application, must also be paid by the applicant.[4] In short, while the department regulates the fees of the register and receiver where not regulated by law, and has in some cases fixed the maximum charge per line for newspapers, the applicant must make his own contracts with the latter, settle the accounts and furnish proof thereof.

§ 652. Posting notice and diagram on the claim — Consolidated claim.— Before commencing proceedings in the land office the applicant is required to post a copy of his plat, together with a notice of his intention to apply for a

[1] Big Flat Gold M. Co. v. Big Flat Gravel M. Co., Copp's Min. Lands, 299; J. B. Rice, 11 L. D. 213; A. J. Gibson, 21 L. D. 219.

[2] Snow Flake Lode, 4 L. D. 30.

[3] Five dollars each to the register and receiver. Gen. L. O. Cir., June 24, 1899, par. 97; R. S. U. S., § 2238, subd. 9.

[4] See *post*, this article, § 664.

patent, in a conspicuous place upon the claim.[1] This notice should contain —

1. The date of posting.
2. The name of the claimant or claimants.
3. The name of the claim, or, in case of a group application, the name of each claim embraced in the group.
4. The number of the survey.
5. The state, county and mining district where the property is situated.
6. The names of adjoining and conflicting claims as shown by the plat and survey, and whether or not these conflicts are intended to be excluded.[2]

One plat and notice is sufficient for a consolidated claim, but where both lode and mill site are applied for, it should be posted on both.[3] This notice must be accompanied by the affidavit of two disinterested witnesses showing that the plat and notice were posted at the time and place therein stated.[4] The book and page of the record must be given.[5]

§ 653. What a sufficient posting — Conspicuous place. — What will be considered a sufficient posting should ordinarily provoke no dispute. It should be "where the same can easily be seen," and generally near the point of discov-

[1] R. S. U. S., § 2325; 17 Stat. at L., p. 92, § 6; L. O. Cir., June 24, 1899, par. 44. As to what is a conspicuous place, see Louisville Lode, 1 L. D. 548; Hughes v. Gilbert, 2 L. D. 556; Pratt v. Avery, 7 L. D. 554; Frederick N. Williams, 17 L. D. 282; Byrne v. Slawson, 20 L. D. 43; Ferguson v. Hanson, 21 L. D. 336; Gowdy v. Kismet G. M. Co., 22 L. D. 624; Omaha G. M. Co., 3 C. L. O. 36; St. Louis S. & R. Co. v. Green, 10 C. L. O. 110. See also next section.

[2] Gen. L. O. Cir., June 24, 1899, par. 44; Tennessee Lode, 7 L. D. 392; Nil Desperandum Placer, 10 L. D. 198; Broad Ax Lode, 23 L. D. 244; Emperor Wilhelm Lode, 5 L. D. 585; Eugene McCarthy, 14 L. D. 105; Hoffman v. Venard, 14 L. D. 45; Frederick N. Williams, *supra;* St. Louis S. & R. Co. v. Green, *supra.*

[3] Bailey & Grand View M. & S. Co., 3 L. D. 386; New York Lode & Mill Site, 5 L. D. 513; Gowdy v. Kismet G. M. Co., *supra.*

[4] R. S. U. S., § 2325; 17 Stat. at L., p. 92, § 6; Gen. L. O. Cir., June 24, 1899, par. 45; Omaha Quartz Mine, Copp's Min. Lands, 191.

[5] Parsons v. Ellis, 23 L. D. 504.

ery, unless there is some other more conspicuous place. This is an integral part of the application.[1] The law requires the notice to be published as well as posted; the obvious intention being that if those concerned do not receive notice from one source they will be likely to do so from the other.[2] And the shaft-house of a claim has been repeatedly held a conspicuous place and sufficient for the purpose.[3] So, "on a tree five or six feet from the mouth of the discovery tunnel," within the limits of the claim, but upon ground excluded, was held sufficient.[4] But posting the notice in a box built into a mound of stones, one hundred and fifty to two hundred feet from the discovery, with a ridge intervening, was held insufficient.[5] Likewise, posting in a tunnel fifty feet from the surface, where none but employees were admitted, was held bad.[6] But where an interested party has knowledge of the publication of notice, a bad posting is, as to him, thus cured.[7] Posting must be made on a mill site as well as on a lode.[8] The notice must also be posted in the land office having jurisdiction.[9]

§ 654. Description of claim in notice — Conform to published notice — Adjoining claims — Must be posted before application. — Too much care cannot be exercised in the preparation of this notice, as upon its accuracy and completeness the regularity and validity of the proceedings for patent will in a great measure depend.[10] The claim should be accurately and particularly described in pursuance of and in accordance with the field-notes, giving the metes and bounds of the claim or claims, together with the line connecting the corner of the survey with a corner of a public

[1] Gross v. Hughes, 29 L. D. 467.
[2] Byrne v. Slausen, 20 L. D. 43.
[3] Louisville Lode Case, 1 L. D. 548; Gowdy v. Kismet G. M. Co., 23 L. D. 624.
[4] Hughes v. Gilbert, 1 L. D. 756.
[5] Ferguson v. Hanson, 21 L. D. 336.
[6] Pratt v. Avery, 7 L. D. 554.
[7] Byrne v. Slausen, *supra*.
[8] Bailey v. Grand View M. & S. Co., 3 L. D. 386.
[9] Frederick N. Williams, 17 L. D. 282. See *post*, § 660.
[10] Gen. L. O. Cir., June 24, 1899, par. 44.

survey or mineral monument.[1] The description must substantially agree with that in the application and in the published notice.

It is imperative that this notice and plat be posted before application for patent in the land office, otherwise it will be void,[2] and the proof thereof must be filed with the other first papers.

§ 655. List of papers to be filed with the application.— The next step is the making of the application in the land office and the filing of the necessary papers constituting it. These papers are:

1. The proof of posting notice and diagram on the claim.
2. The application for patent.
3. Copy of approved plat.
4. Copy of approved field-notes.
5. Abstract of title, unless the applicant be the original locator; in which case there should be an affidavit or certificate of county recorder showing that he has disposed of no part of his interest.
6. Certified copy of original location notice.
7. Affidavit of citizenship, unless there be but one applicant, and the fact of his citizenship is set forth in the original application.
8. Agreement of publisher.
9. Notice for publication.
10. If applicant is a corporation, a certified copy of its certificate of incorporation or charter, or reference to one already on file.
11. If application is made by agent, a copy of the power

[1] Kempton Mine, 1 C. L. O. 178; Hamburg & Hallett Lodes, 27 L. D. 104; Eugene McCarthy, 14 L. D. 105; American Flag Lode, 6 L. D. 320. It should also give the names of the nearest known adjoining claims. Gowdy v. Kismet G. M. Co., 22 L. D. 624; Parsons v. Ellis, 23 L. D. 505. But a failure to do this will not necessarily vitiate the claim. Whitman v. Haltenhoff, 19 L. D. 245. And an error in the description will not justify the ignoring of the notice. Equator Lode, Copp's Min. Lands, 178.

[2] R. S. U. S., §2325; L. O. Cir., June 24, 1899, pars. 44, 45; De Long v. Hine, 1 L. D. 545; Tilden v. Intervenor M. Co., 1 L. D. 572; Prince of Wales Lode, 2 C. L. O. 2.

of attorney, or, in case of application made by an agent on behalf of a corporation, a copy of the resolution appointing such agent.

12. If the land has not been returned as mineral, proof of its mineral character should be furnished, but this is generally set forth in the application itself.

13. Proof of the performance of annual labor up to the current year, but this is also usually set forth in the application itself.[1]

14. A certified copy of the by-laws of the district, if any there be, or a reference to such already filed.

§ 656. The application for patent — Its allegations of facts and general contents.— The application for patent is the formal statement under oath of the matters of fact connected with the location and holding of the claim, and upon which the applicant relies as showing his compliance with the law and his right to a patent thereunder. While much of the matter usually set forth in applications for patent has been reduced to printed forms, which, with proper changes to fit special facts of the particular case, may be relied upon as guides in the preparation and filing of such applications, we may not improperly set forth the following general statement as to what should appear, either in the application itself, or the exhibits attached and referred to in the application.

(a) The name of the applicant with his postoffice address, the fact of his citizenship, with accompanying proof either in the form of the affidavit of citizenship of the applicant, or a copy of the certificate or articles of incorporation of a corporation. The general practice, in case the applicant is a corporation, is to file a certificate of that fact signed by the secretary of state.

(b) The name of the claim with its locus, including a certified copy of the location notice, duly referred to, with the place of record, book and page thereof, and of all amendments, the description of the claim as surveyed, including

[1] R. S. U. S., § 2325; Gen. L. O. Cir., June 24, 1899, pars. 45–47.

the field-notes of the survey, all of which must show the section, township and range, if on surveyed land, otherwise with reference to a mineral monument.

(c) The date and fact of discovery and location, and by whom made, and of a compliance (stated in general terms) with all the laws, rules and regulations of the United States, state and district, and that it is mineral land, and so held and worked.[1]

(d) The performance of annual labor, and likewise of the necessary five hundred dollars improvements, and properly, although not always necessary, the nature and character thereof, and that they tend to develop the claim and have not been applied to any other claim; but the requisite amount must be proved to the surveyor-general, whose certificate thereof is conclusive.

(e) The transfers of title, as shown by the abstract of title, duly referred to, which must show, and the allegation be, that by mesne conveyances the applicant is the owner, in the possession and entitled to the possession,[2] and to a patent for the land.

(f) If compliance with local rules is relied upon for the existence of any right in connection with the application, such rules must be referred to and a copy attached, or the place where the same can be found, in another application from the same district, mentioned. If there is no district, or if there are no rules, the fact should be stated.

(g) The fact and date of posting notice of application for patent, and the proof thereof, exhibited.

§ 657. By whom and how application may be sworn to.— This application must be sworn to by the party making it.[3] But where several co-owners are making application, it may be sworn to by one on behalf of all.[4] If the applicant be absent, or where the applicant is a corporation,

[1] John Downs, 7 L. D. 71. See also Ayers v. Daly, 8 C. L. O. 196.

[2] Montana Co., 6 L. D. 621.

[3] Jefferson M. Co. v. Pennsylvania M. Co., 1 C. L. O. 66; Gen. L. O. Cir., June 24, 1899, par. 45; R. S. U. S., § 2325.

[4] Ayers v. Daly, 8 C. L. O. 196.

the application may be sworn to by a duly authorized agent.[1] This affidavit, as well as all others required by the land office regulations, may be sworn to before any officer authorized to administer oaths within the land district where the ground in question is situated.[2] It has been held by the land department with reference to isolated districts in Alaska, and this rule ought to apply with equal force under similar circumstances elsewhere, that the deputy surveyor may administer the oaths to chainmen and other assistants, where notaries and other officers are difficult to reach.[3] The land department has undertaken to hold that proof of the application should not be made before the applicant's attorney.[4] But this at most would be merely an irregularity, and could not avoid the proof.

§ 658. **Citizenship, how proved.**—The applicant must show that he is a citizen of the United States, or has declared his intention to become such, before his application for a patent will be considered.[5] The proof of this citizenship may be, in the case of a single applicant, by his own affidavit setting forth whether he is a citizen by nativity or naturalization.[6] In case of an association of persons, unincorporated, by the affidavit of their authorized agent, made on his own knowledge or upon information and belief.[7] In case of a corporation organized under the laws of any one of the states, or the United States, by the filing of a certified copy of their charter or certificate of incorporation.[8]

[1] R. S. U. S., § 2325, as amended in Supp. R. S., vol. I, p. 276; Topsy Mine, 7 C. L. O. 20; Rico Lode, 8 L. D. 238.

[2] R. S. U. S., § 2335; Corning Tunnel v. Slide Lode, Copp's Min. Lands, 208.

[3] Clinton Gurnee, 13 L. D. 608.

[4] Bright v. Elkhorn M. Co., 9 L. D. 508.

[5] R. S. U. S., § 2319; Baker Fraction Placer, 23 L. D. 112; A. P. Smith, 3 L. D. 340; Sold Again Fraction Mining Lode, 20 L. D. 58; Wingate Placer, 22 L. D. 704; Cash Lode, 1 C. L. O. 98; City Rocks & Utah v Pitt, 1 C. L. O. 146; Wandering Boy, 2 C. L. O. 2; Sanford, 1 C. L. O. 98; Capricorn Placer, 10 L. D. 641.

[6] R. S. U. S., § 2321; Gen. L. O. Cir., June 24, 1899, par. 68.

[7] *Ante*, note 6.

[8] Id.

Where application is made by one party as trustee for another, the nature of the trust must be stated and the citizenship of the *cestui que trust* must be shown.[1] This rule has been held to extend to assignees for creditors, but reason is the other way, as the creditors may be too numerous, and the trustee has the entire estate, the possible residue being merely "proceeds."

§ 659. Applications by trustees, executors or administrators — Co-owners as trustees — Equitable interests.— As intimated in the last preceding section, an application for patent may be made by one party as trustee for another, and in this case the nature of the trust must be stated.[2] This relates to cases where the applicant makes his application as trustee. Another kind of trust arises where, for instance, one of several owners of a mining claim relocates it in his own name, under an agreement to hold it for the benefit of all former owners, and proceeds to patent it in his own name, in which case he will be presumed to hold the title acquired by him under the patent in trust for the other co-owners.[3] Of course this rule would apply with equal force where one of several co-owners secured the legal title of his co-owners for the purpose of applying for patent. In short, the owner of the legal title should and must apply for the patent, and equitable interests cannot be affected by it.

An application may also be made by the executor or administrator of the estate of a deceased person, in which case a copy of his letters of administration must be furnished;[4]

[1] Gen. L. O. Cir., June 24, 1899, par. 59; Capricorn Placer, 10 L. D. 641; Commissioner to Charles W. O'Neil, Dec. 7, 1891. As to citizenship generally, see *ante*, Part V, ch. I, §§ 241–243, 253.

[2] Gen. L. O. Cir., June 24, 1899, par. 59; Capricorn Placer, 10 L. D. 641. The fact that an applicant is a trustee for the benefit of creditors does not relieve him from this requirement. Commissioner to Charles W. O'Neil, Dec. 7, 1891.

[3] Hunt v. Patchin, 13 Sawy. 304, 35 Fed. Rep. 816. See *post*, § 752.

[4] Commissioner to A. Morrell, Copp's Min. Lands, 190. The decisions of the land department are not

and the patent should issue to the heirs, especially in jurisdictions where the real property of the decedent descends to his heirs and not to his executor, which is the prevailing rule in most of the states.

§ 660. Posting and publishing notice — Summons to all the world — Statute must be complied with.— When the papers denominated as the "first set"[1] have been filed in the office of the register of the land office, he is required to post in his office, for a period of sixty days, notice of such application for patent, and to cause the same to be published for the same period in a newspaper.[2] This is an important proceeding, essentially a proceeding *in rem*, and the statute should be literally complied with. It has been held to operate in the same manner as a summons in a civil action, giving constructive notice to all persons who may claim rights of any nature adverse to those of the applicant,[3] requiring them to come in and assert their rights. A failure to do this within the time allowed is construed as a waiver of any adverse rights, or, as provided by the statute,[4] it will be assumed that no adverse claim exists. A right thus waived is lost forever, unless some circumstance of fraud, or other equitable ground of relief, converts the patentee into a trustee.[5]

uniform on the question to whom patent should be issued where the applicant dies pending proceedings. Tripp v. Dunphy, 28 L. D. 14. But the weight of reason would seem to support the text.

[1] *Ante*, § 655.

[2] R. S. U. S., § 2325; Gen. Land Office Cir., June 24, 1899, par. 50; Tilden v. Intervenor M. Co., 1 L. D. 572; Mimbres M. Co., 8 L. D. 457; Frederick N. Williams, 17 L. D. 282; Great Western Lode, 5 L. D. 510.

[3] Wight v. Dubois, 21 Fed. Rep. 693; Eureka M. Co. v. Richmond M. Co., 4 Sawy. 202, 8 Fed. Cas. 119; Hunt v. Eureka Gulch M. Co., 14 Colo. 451, 24 Pac. Rep. 550; Marshall S. M. Co. v. Kirtley, 12 Colo. 410, 21 Pac. Rep. 492; Wolfley v. Lebanon M. Co., 4 Colo. 112; People ex rel. Darby v. District Court El Paso County, 19 Colo. 343, 35 Pac. Rep. 731; Kannaugh v. Quartette M. Co., 16 Colo. 341, 27 Pac. Rep. 245.

[4] R. S. U. S., § 2325.

[5] Kannaugh v. Quartette M. Co., *supra;* Lee v. Stahl, 9 Colo. 208, 11 Pac. Rep. 77; Seymour v. Fisher, 16 Colo. 188, 27 Pac. Rep. 240; Hunt v. Eureka Gulch M. Co., *supra;* Wight v. Dubois, *supra;* Turner v. Saw-

§ 661. How period of publication computed — Length of time in daily and weekly paper.— The United States statutes require that this notice be published for a full period of sixty days;[1] and in computing this period the first day of the publication is excluded.[2] If the publication is in a daily paper, it must be published in sixty-one consecutive issues; if in a weekly paper, it should appear in ten consecutive issues.[3] This last statement is in conformity with the former decisions of the land department, but not with the latest, which hold that nine insertions in a weekly newspaper are sufficient;[4] and that after the sixtieth day and nine publications, no adverse claim may be filed. It can be seen, however, without any great mental effort, that nine issues of a weekly paper only cover a period of fifty-six days, and as the law requires a full period of sixty days' publication, the soundness of this ruling may justly be questioned; as well say that any less number of publications will do, by waiting the full period for an adverse claim. It is probable, however, that the presumption of regularity which surrounds the proceedings of the land department will be a sufficient whale to save (*a la* Jonah) any patent issued upon such notice.

§ 662. Where published — Reputable newspaper.— The notice must be published in the newspaper published nearest the claim.[5] No distinction in this regard is made between

yer, 150 U. S. 578. As to when patentee becomes trustee, see *post*, § 752.

[1] R. S. U. S., § 2325.

[2] Eureka M. Co. v. Jennie Lind M. Co., Copp's Min. Lands, 124; Bonesell v. McNider, 13 L. D. 286; Waterhouse v. Scott, id. 718; Gen. L. O. Cir., June 24, 1899, par. 50.

[3] Gen. L. O. Cir., June 24, 1899, par. 50; Sec'y to Com'r Drummond, Copp's Min. Lands, 132; Com'r to Reg. & Rec. at Leadville, Colo., Copp's Min. Lands, 261; Eureka M. Co. v. Jennie Lind M. Co., *supra*; Great Western Lode, 5 L. D. 510; Am. Flag Lode, 6 L. D. 320.

[4] Davidson v. Eliza G. M. Co., 28 L. D. 224, citing Albert A. Prenzlauer, 27 L. D. 617, modifying Miner v. Mariott, 2 L. D. 709-11. See also Department Regulations, 28 L. D. 603.

[5] R. S. U. S., § 2325: Gen. L. O. Cir., June 24, 1899, par. 50; Com'r to Central City Office, Copp's Min.

two or more newspapers printed in the same town or city.[1] A reasonable discretion is vested in the register regarding the selection of the newspaper, and it is his duty to choose a reliable newspaper, even though one of questionable character and responsibility be published nearer the claim than the one selected.[2] It may be well to add in this connection that the notice must appear the full period in the same paper.[3] Where the land is in two districts the notice must be posted in the land office of each, and published in the paper nearest the claim.[4]

§ 663. Final entry—Papers to be filed—After-acquired title—Successor in interest of applicant.— At the expiration of the sixty-days period of publication and posting of notice, if no adverse claim has been filed, the applicant may proceed to make final entry of the claim.[5] This is done by filing in the land office:

1. Proof, by affidavit of one or more of the applicants,

Lands, 135; Sec'y Chandler to Com'r, Copp's Min. Lands, 198; Brown v. Lewis, 1 C. L. O. 50; Condon v. Mammoth M. Co., 15 L. D. 330; Brettell v. Swift, 16 L. D. 178. The last two authorities hold the nearest newspaper to be the one nearest by traveled routes.

[1] William A. Arnold, 2 L. D. 745; Erie Lode v. Cameron Lode, 10 L. D. 655; Condon v. Mammoth M. Co., *supra*. See also Cameron v. Seaman, 69 N. Y. 396.

[2] Tomay v. Stewart, 1 L. D. 570; Cornell Lode, 6 L. D. 717; Erie Lode v. Cameron Lode, *supra;* Condon v. Mammoth M. Co., *supra;* Brettell v. Swift, 17 L. D. 558, where it is said: "The consensus of the rules and decisions seems to be that the notices must be published in an established newspaper with a *bona fide* circulation in the neighborhood of the claim. . . . I take it that newspapers of this character are to be selected in preference to those predatory journals that are frequently found in new localities, established oftentimes for the sole purpose of getting the land-office notices and ready to migrate to newer settlements when business becomes 'slack' from the local office." See also Charles W. Steele, 3 L. D. 115; Gen. L. O. Cir., June 24, 1899, par. 52.

[3] Com'r to Reg. & Rec. at Salt Lake, Copp's Min. Lands, 136. And should not be changed from the daily to the weekly edition. In re Cannon, 3 C. L. O. 18, Copp's Min. Lands, 189.

[4] Com'r to San Francisco Office, Copp's Min. Lands, 181; Frederick N. Williams, 17 L. D. 282.

[5] R. S. U. S., § 2325; Gen. L. O. Cir., June 24, 1899, par. 56.

that notice and diagram remained posted on the claim during the period of publication.[1]

2. Proof of publication of notice by affidavit of publisher.[2]

3. Application to purchase signed by the applicant or his or its agent or attorney.

4. Statement of fees and charges paid, sworn to by applicant or agent or attorney.[3]

5. Certificate that no suit is pending; or, if adverse claim has been filed, a copy of the decree.

6. Proof of five hundred dollars improvements, if not previously filed.[4]

7. Abstract of title brought down to date, showing title in present applicant or applicants.[5]

The department has recently published rules to the effect that the final entry must be by the applicant, and that subsequent transfers will not be considered.[6] The soundness of this rule, however, may well be questioned. Since a mining claim may be sold on execution, as we have seen, it must necessarily follow that it may be sold during the *interim* between the application and the final proof, and there is no rule of law by which the title acquired by patent in such case would go to the execution purchaser; hence he must be allowed to make entry and purchase as a successor in interest, and the same rule should apply to any other change of interest.[7]

[1] R. S. U. S., § 2324; Circular Instructions, June 24, 1899, 28 L. D. 603; Prince of Wales Lode, Copp's Min. Lands, 162; Tangerman v. Aurora Hill M. Co., 9 L. D. 538; Bright v. Elkhorn M. Co., 9 L. D. 503; Kempton Mine, Copp's Min. Lands, 154; Omaha Quartz Mine, Copp's Min. Lands, 191.

[2] Gen. L. O. Cir., June 24, 1899, par. 56.

[3] Id., par. 57.

[4] Gen. L. O. Cir., June 24, 1899, par. 52; R. S. U. S., § 2325.

[5] Daniel Cameron, 4 L. D. 516; Riste v. Morton, 20 Mont. 139, 49 Pac. Rep. 656; Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 558; Kempton Mine, *supra;* Gold Dirt Lode, 10 C. L. O. 119; N. E. Ext. Yosemite Lode, 8 C. L. O. 18; Colorado Relocations, Copp's Min. Lands, 175; Com'r Drummond to Hempstead & Kirkpatrick, Copp's Min. Lands, 123.

[6] Reg. Gen. L. O. Cir., July 26, 1901, p. 36, § 71.

[7] See *post*, § 664; Hamilton v. So. Nev. G. M. Co., 33 Fed. Rep. 562, 565.

§ 664. Receiver's receipt, when issued and to whom — Owner of title — Mortgagee.— Upon the filing of these papers the register will, if he is satisfied that the law has in all respects been complied with, permit the applicant to pay the purchase price, which in the case of a lode claim, or lode and adjoining mill site, is five dollars for each acre or fraction, or two dollars and fifty cents for each acre or fraction in the case of a placer claim.[1] The receiver's receipt will thereupon issue to the party entitled to it as shown by the corrected abstract.[2] It makes no difference how many transfers may have occurred between the filing of the first papers and the final entry, if the person making final entry shows himself to be the holder of the legal title and qualified to receive patent.[3] But a purchaser at a judicial sale does not hold the legal title until issuance of sheriff's deed.[4] An application by a mortgagee will be permitted to stand if he subsequently acquires the legal title.[5]

§ 665. Value and effect of receiver's receipt — Conclusive as to what, prima facie as to what — Assessment work after receiver's receipt.— The receiver's receipt is *prima facie* evidence that its possessor has complied with the law.[6] It is conclusive evidence, in the absence of fraud, that he is entitled to the land described,[7] and thereafter the government holds the dry, naked title in trust for him.[8] It

[1] R. S. U. S., §§ 2333, 2337; Gen. L. O. Cir., June 24, 1899, par. 57.

[2] R. S. U. S., § 2326. See also note 6, *ante*, p. 574, last preceding section.

[3] Gwillim v. Donnellan, 115 U. S. 45; Prince of Wales Lode, 2 C. L. O. 2; A. P. Smith, 3 L. D. 340; Montana Co., 6 L. D. 261; Com'r to Gen. Aspinwall, Copp's Min. Lands, 97.

[4] I. X. L. & Ophir Qtz. Mine & Mill Site, Clark's Min. L. Dig. 176; Turner v. Sawyer, 150 U. S. 578, 37 L. ed. 1189.

[5] White Extension West Lode, 22 L. D. 677.

[6] Sparks v. Pierce, 115 U. S. 412.

[7] Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428; Aurora Hill Cons. M. Co. v. 85 M. Co., 34 Fed. Rep. 515; 420 M. Co. v. Bullion M. Co., 3 Sawy. 634, 9 Fed. Cas. 592; Courchaine v. Bullion M. Co., 4 Nev. 369; Deno v. Griffin, 20 Nev. 249, 20 Pac. Rep. 308; Alta M. & S. Co. v. Benson M. & S. Co. (Ariz.), 16 Pac. Rep. 565; Schurz to Com'r Williamson, Copp's Min. Lands, 237; Gold Blossom Qtz. Mine, 2 L. D. 767.

[8] Aurora Hill M. Co. v. 85 M. Co., *supra*; Noyes v. Mantle, 127 U. S.

is, however, within the power of the department to cancel the receiver's receipt, in a proper proceeding, for fraud or mistake.[1] But this is a matter entirely for the general land office, and is not within the province of a local office,[2] and for this reason it is sometimes advisable to continue the performance of annual labor up to the issuance of patent.[3] This is merely a precautionary measure, however, and is not required by the statute.[4]

§ 666. Placer application — Lode in placer — Known lode — Effect of patent. — The proceedings are the same in the case of an application for patent to a placer claim as such, as those in the case of a lode.[5] But where the placer claim contains a lode known to exist at the date of application, the applicant must define and assert his right to such lode or he will be deemed to have waived it.[6] A lode, to

348; Deffeback v. Hawke, 115 U. S. 405; Pacific Coast M. Co. v. Spargo, 16 Fed. Rep. 818; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, 24 Fed. Cas. 590; Hayner v. Stanley, 13 Fed. Rep. 226; Hamilton v. Southern Nevada G. & S. M. Co., 33 Fed. Rep. 566.

[1] Hosmer v. Wallace, 47 Cal. 461; Caldwell v. Bush, 6 Wyo. 342, 45 Pac. Rep. 488; Parsons v. Venzke, 164 U. S. 89.

[2] Commissioner to Sacramento Office, Feb. 9, 1892; Figg v. Hensley, 52 Cal. 299; Murray v. Polglase, 17 Mont. 455, 43 Pac. Rep. 505; Perrott v. Connick, 13 L. D. 598.

[3] Alta M. & S. Co. v. Benson M. & S. Co., *supra; ante*, § 493.

[4] Alta M. & S. Co. v. Benson M. & S. Co., *supra.*

[5] R. S. U. S., § 2329; 16 Stat. at L., p. 216, sec. 12; Gen. L. O. Cir., June 24, 1899, par. 60.

[6] R. S. U. S., § 2333; 17 Stat. at L., p. 94, sec. 12; Gen. L. O. Cir., June 24, 1899, par. 62 (1); Sullivan v. Iron Silver M. Co., 109 U. S. 550; Noyes v. Mantle, 126 U. S. 348; Sullivan v. Iron Silver M. Co., 143 U. S. 431; Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394; Mont. Central Ry. Co. v. Migeon, 68 Fed. Rep. 811; Migeon v. Mont. Central Ry. Co., 23 C. C. A. 150, 77 Fed. Rep. 249; Reynolds v. Iron Silver M. Co., 116 U. S. 687; Dahl v. Raunheim, 132 U. S. 260; Iron Silver M. Co. v. Cheesman, 116 U. S. 529; Dahl v. Mont. Copper Co., 132 U. S. 264; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; United States v. Iron Silver M. Co., 128 U. S. 673; War Dance Lode v. Church Placer, 1 L. D. 459; Becker v. Sears, 1 L. D. 577; Railroad Lode v. Noyes Placer, 9 L. D. 26; Juniata Lode, 13 L. D. 715; Largey v. Black, 10 L. D. 156; Elda M. & M. Co. v. Mayflower G. M. Co., 26 L. D. 513; Clary v. Haz-

be excluded from a placer claim, must have some present value as such, or must have been located or claimed as such prior to application for patent.[1] A patent issued for placer ground vests in the patentee complete and absolute title to all lodes not known to exist at the time of or prior to the date of application for the patent.[2] The question as to whether a vein or lode is known to exist at the date of entry is purely one of fact, and, so far as the patent proceedings are concerned, is exclusively within the jurisdiction of the land department.[3] Where a patent has been regularly issued by the land department, the court will, in the absence of a clear showing of fraud, refuse to interfere with it.[4] But the patent is restricted in its operation to its exact terms as authorized by the law, and any enlargement of terms is unauthorized and void.[5] The burden of proving that a lode was known to exist within a placer claim at the date of application is upon the person asserting it.[6] The purchase

lett, 67 Cal. 286, 7 Pac. Rep. 701; Mt. Rosa M. & M. L. Co. v. Palmer (Colo.), 56 Pac. Rep. 176; Raunheim v. Dahl, 6 Mont. 167, 9 Pac. Rep. 892; Montana Copper Co. v. Dahl, 6 Mont. 131, 9 Pac. Rep. 894; Casey v. Thieviege, 19 Mont. 341, 48 Pac. Rep. 394; Brownfield v. Bier, 15 Mont. 403, 39 Pac. Rep. 461.

[1] Iron Silver M. Co. v. Sullivan, 5 McCrary, 274, 16 Fed. Rep. 829; Sullivan v. Iron Silver M. Co., 143 U. S. 436.

[2] Reynolds v. Iron Silver M. Co., 116 U. S. 687; United States v. Iron Silver M. Co., 128 U. S. 673; Montana Copper M. Co. v. Dahl, 6 Mont. 131, 9 Pac. Rep. 894; War Dance Lode v. Church Placer, 1 L. D. 549; Maggie Lode, 14 L. D. 655. Where a lode is discovered by third parties within the limits of a placer claim after application for patent to the latter, the placer claimant may not amend his application to include such lode. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 94.

[3] Iron Silver M. Co. v. Campbell, 135 U. S. 286; Wright v. Rosebury, 121 U. S. 488; United States v. Schurz, 102 U. S. 378; South Star Lode, 20 L. D. 204.

[4] Aurora Lode v. Bulger Hill & Nugget Gulch Placer, *supra;* South Star Lode, *supra;* Iron Silver M. Co. v. Campbell, *supra;* Wright v. Rosebury, *supra.*

[5] United States v. Iron Silver M. Co., *supra;* Iron Silver M. Co. v. Mike & Starr M. Co., *supra.* See also Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 56 Pac. Rep. 176; *post,* § 751.

[6] Cripple Creek G. M. Co. v. Mt. Rosa M. M. & L. Co., 26 L. D. 622.

price to be paid for a lode within a placer is five dollars per acre for the lode and twenty-five feet on each side, and two dollars and fifty cents per acre for the remainder.[1]

§ 667. Known lode or vein in placer — Means of knowledge, and what sufficient knowledge.— Enlarging somewhat upon matters adverted to in the last preceding section, as also upon the questions partially treated in a former part,[2] it becomes important to determine as to when a lode is known to exist, and to whom the knowledge must come, as well as the nature and character of applications and claims to which the generic terms "known veins," "known mines," or "known lodes" can be said to apply.

There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein, within the intent and meaning of the different sections of the Revised Statutes: (a) Between miners who have located claims under the provisions of section 2320; (b) between placer and lode claimants under the provisions of section 2323; (c) between mineral claimants and parties holding town-site patents to the same ground; and (d) between mineral and agricultural claimants of the same land, the different terms being applicable to the situation, according to the nature of the questions involved. In the three latter of these subdivisions, substantially the same question is presented at the time of the application for patent, for other than the lode claim; and to protect the rights of all parties concerned it is important to ascertain and define with certainty the rights of the lode or mineral claimant in the premises; the knowledge essential being referable, as we shall notice hereafter, to the time of application for patent for land other than as a lode. As was said by the circuit court of appeals of the ninth circuit: "The mining laws of the United States were drafted for the purpose of protecting the *bona fide* locators of mining ground, and at the same time to

[1] R. S. U. S., § 2333. [2] *Ante*, §§ 320, 321.

make necessary provision as to the rights of agriculturists and the claimants of town-site lands. The object of each section, and of the whole policy of the entire statute, should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view in order to enable the court to arrive at a correct conclusion. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from a difference in the facts and a difference in the character of the cases, and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court. . . The fact is there is a substantial difference in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein or lode between different claimants of the same lode under section 2320 on the one hand, and a 'lode known to exist' within the limits of a placer claim at the time application is made for a patent therefor, under section 2333 on the other."[1]

Applying these principles, then, to the matter in hand, it must be apparent that the general rule of notice or knowledge which governs and controls the actions of men in all the affairs of life, as ascertained by the general law, must apply here. Manifestly, a man must be said to know that which he is in possession of the means of ascertaining; of that of which he has such notice as to put a reasonably prudent man upon inquiry. He may not "shut his eyes and buy."[2] The existence of facts, then, whether they exist in physical conditions of the ground, or workings beneath it, of which all persons of the vicinage have a common knowledge, must put a man upon inquiry. For example, such surface indications as tunnels, shafts or other workings usu-

[1] Migeon v. Montana Central Ry. Co., 77 Fed. Rep. 249, 23 C. C. A. 156. See also Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., dissenting opinion of Justice Field, 143 U. S. 394, 423. See *post*, § 788.

[2] Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., *supra*, p. 394.

ally made in lode mining,[1] or the fact that a location is marked upon the ground and recorded,[2] but not in all cases a notice alone, would properly be held to impart notice.[3]

A distinction is said to exist between belief upon the one hand and knowledge upon the other.[4] In the last case mere belief alone is said to be insufficient. But we think this is hair-splitting, and that the true rule is in substance as we have stated it, that a man must be held to know that of which he has such notice as to put a reasonably prudent man upon inquiry.

§ 668. Test of knowledge.— A careful reading of the cases discloses a slight variance in opinion as to the true test of knowledge of the existence of a vein or lode within a placer. Some of the earlier cases held, or seemed to hold by *dictum* at least, that an actual subsisting location was the test of knowledge. And that was the last expression in a dissenting opinion by Mr. Justice Field.[5] But the prevailing opinion in that case declares what seems to be the logic of the situation in these words: "Our conclusions are, first, in respect to the matter of the known vein, that the reasons so clearly stated by Mr. Justice Field, speaking for the court in a previous case,[6] are unanswerable, and forbid an adjudication that the term 'known vein' is to be taken as synonymous with 'located vein,' and compel a reiteration of the declaration heretofore made, that the term refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location."[7]

§ 669. To whom notice or knowledge must come.— Of course the notice or knowledge, to be effectual for any pur-

[1] Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., *infra*.

[2] Noyes v. Mantle, 127 U. S. 348.

[3] Wilson Creek M. & M. Co. v. Montgomery, 28 L. D. 476.

[4] Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Sullivan v. Iron Silver M. Co., 143 U. S. 431.

[5] Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

[6] Noyes v. Mantle, 127 U. S. 348.

[7] Iron Silver M. Co. v. Mike & Starr Co., *supra*.

pose, must be brought home to the applicant in some certain manner, as indicated in a preceding section.[1] It is not enough that some one else knows, or has the means of knowledge; it must appear that the applicant himself knew, or had the means of knowledge brought home to him in such a way as that, to shut his eyes to the same, would be a fraud. Yet, a notorious fact in the community, so obvious and universally recognized as to exclude the idea of want of knowledge on the part of any person, must be held to impart knowledge or notice to the applicant. What he may learn by the most casual inspection, where duty requires him to investigate, he must be held to know.[2]

§ 670. Time of knowledge — Sufficiency of allegation of knowledge.— Some confusion of thought is indicated in a few of the cases as to what particular time, in the history of the proceedings, the knowledge must apply; some *dicta* at least giving it relation to the date of the patent, while others, which is the true rule, apply the knowledge to the date of application.[3] Whence it follows that it can make no difference how many locations or discoveries may be attempted after the date of application for a patent or the final entry thereunder; they cannot affect the question, nor militate in the slightest degree against the patent for the placer including a lode.[4] Applying this principle, Judge Knowles held that the allegation in the bill of complaint that the application for patent was made before the discovery of the alleged lode was sufficient without giving dates either of the application or the discovery.[5]

[1] *Ante*, § 667.

[2] Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394; Noyes v. Mantle, 127 U. S. 348. See also, generally, Deffeback v. Hawke, 115 U. S. 394; United States v. Iron Silver M. Co., 128 U. S. 673; Colorado C. & I. Co. v. United States, 123 U. S. 307; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Dahl v. Raunheim, 132 U. S. 260; Dower v. Richards, 151 U. S. 661; Mt. Rosa M. Co. v. Palmer, 26 Colo. 56, 56 Pac. Rep. 176, 50 L. R. A. 289.

[3] Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Aurora Lode v. Bulger Hill, etc. Placer, 23 L. D. 95.

[4] Migeon v. Montana Central Ry. Co., 77 Fed. Rep. 249; United States v. Iron S. M. Co., 128 U. S. 673.

[5] O'Keefe v. Cannon, 52 Fed. Rep. 898.

§ 671. Application for mill sites.— The proceedings to obtain patent to mill sites are in all respects the same as those for lode or placer claims, except that there must be a *prima facie* showing that the land is non-mineral in character.[1] An application may also be made for a mill site, by the owner of a vein or lode or placer claim, in connection with his application for such claim.[2] Patent will not be issued for a mill site including more than five acres.[3] The price to be paid for mill sites is the same as for lode claims — five dollars per acre or fraction.[4]

§ 672. Application under the statute of limitations.— The statute provides that where a claim has been held and worked by its owners for a period equal to the statute of limitations of the state or territory in which it is situated proof of such possession and work shall, in the absence of adverse claim, be sufficient to entitle the applicant to a patent.[5] The effect of this statute is to relieve the applicant from the necessity of proving his location of the claim, the location by his predecessors or the furnishing of an abstract of title, as in other cases, but he is required to furnish a duly certified copy of the statute of limitations of the state or territory, together with his own sworn statement showing the facts as to the origin of his title and continuation of his possession of the ground applied for, the area thereof, the nature and extent of the work done, whether there has been any opposition to or litigation regarding his possession of the ground, and if so when the same ceased, whether such cessation was the result of compromise or judicial decree, and any other facts bearing upon the question.[6] This should also be accompanied by a certificate of the clerk of court or

[1] R. S. U. S., § 2337; Gen. L. O. Cir., June 24, 1899, pars. 66, 67.

[2] R. S. U. S., § 2337; Gen. L. O. Cir., par. 64.

[3] R. S. U. S., § 2337; Gen. L. O. Cir., *supra*, par. 64.

[4] R. S. U. S., § 2337; Gen. L. O. Cir., *supra*, par. 65. As to location of mill sites, see *ante*, §§ 324, 325 and 326.

[5] R. S. U. S., § 2332.

[6] Land Office Cir., June 24, 1899, pars. 76, 77.

courts having jurisdiction of the matter to the effect that no suit is pending, and that there has been none within the period of the statute of limitations, or if so, a copy of the decree.[1] The claimant's own statement should be corroborated by the affidavit of disinterested persons.[2]

This provision relates solely to the procedure relative to proving title. All other steps in the matter of application are the same as heretofore outlined.[3] And where an adverse claim is filed in the land office, the applicant is obliged to defend his rights in a court of competent jurisdiction, the same as though his application were based upon a valid location; but upon the trial, as in the land office, proof of possession and work for a period equal to the statute of limitations would be equivalent to a location.[4] It would seem that he ought also to furnish proof that the claim was actually marked upon the ground by him or his predecessors, and that such markings correspond substantially with the description of the claim as surveyed and applied for. His *status*, however, if an adverse claim is filed, is not so clear. If the owner's boundaries are plainly marked and an actual adverse possession maintained, it would seem to be equally conclusive against the adverse claimant. But that is an independent fact, and the adverse claim must rest upon its own merits. The statute simply undertakes to dispense with many of the formalities in the way of proof in the absence of an adverse claim.[5] And where an application for patent for mining land has been made in the proper office and in due form, and notice thereof given as required by law, and no adverse claim is filed, and the proceedings have culminated in a patent, it is conclusive as to all questions which could have been raised by an adverse claim.[6]

[1] Land Office Cir., June 24, 1899, par. 78.

[2] Land Office Cir., *supra*, par. 79.

[3] See for application for patent generally, *ante*, this article.

[4] McCowan v. McLay, 16 Mont. 234, 40 Pac. Rep. 602. See also Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471.

[5] McCowan v. McLay, *supra*.

[6] Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 16 Pac. Rep. 518.

§ 673. Effect of application for patent — Segregates land applied for from public domain.— An application for patent duly and regularly filed in the local land office is *prima facie* evidence of the appropriation of the land described in the application, so far, at least, as to prevent any other person from applying for the ground pending such application.[1] For the time being, at least, it operates to remove the premises in question from the jurisdiction of local laws.[2] But in order to have this effect the application must be followed by the publication and posting of notice.[3] Where an application has been properly filed in the land office, but has never been prosecuted to final entry, such application must be disposed of before a subsequent application will be received for the same land.[4]

§ 674. Similarities of statute to Mexican law.— There are some, indeed many, of the proceedings in the matter of application for patent for mining claims which had almost their exact counterpart in some of the proceedings under the Mexican law; as, for instance, the requirement that the surveyor who went upon the ground in seeking to register the mine should be a government officer. This is analogous to the requirement in our law that the survey shall be made by a deputy mineral surveyor. Under the Mexican law the surveyor marked the boundaries of the claim, and reported and recorded the peculiarities of the mount-

[1] Rose v. Richmond Mining Co., 17 Nev. 25, 27 Pac. Rep. 1105; Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80, 1 Pac. Rep. 448; Gunnison Crystal M. Co., 1 C. L. O. 70; Great Eastern M. Co. v. Esmerelda M. Co., 2 L. D. 704; Hall v. Street, 3 L. D. 40; Rice v. Redding, 11 L. D. 218; Rocky Lode, 15 L. D. 571; Andrew J. Gibson, 21 L. D. 219.

[2] Daney G. & S. M. Co. v. Sapphire S. M. Co., 2 C. L. O. 66. See also J. G. Sanders v. N. P. R. R. Co., Com'r to Helena Office, April 19, 1892, and Sept., 1893.

[3] Snow Flake Lode, 4 L. D. 30.

[4] Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80, 1 Pac. Rep. 448; Rose v. Richmond M. Co., *supra;* Crown Point Lode, Sickels' Min. Dec. 116; Hurricane Lode, id. 243; Rebellion M. Co., 1 L. D. 543; Great Eastern M. Co. v. Esmerelda M. Co., *supra;* Snow Flake Lode, *supra;* Moylan C. Fox, 2 L. D. 704.

ain, which requirements have their counterpart in our law. Under the Mexican law the boundaries were also required to be marked with reference to permanent monuments; and the posting of the notice of registry, and proclaiming it from churches and public places, is also analogous to our requirement of publication in a newspaper and posting on the claim and in the land office.[1]

ARTICLE B.

Of the Adverse Claim, Including Contents, Sufficiency and Time and Manner of Filing.

§ 675. Distinction between adverse claim and protest.
676. Nature and purpose of adverse claim.
677. Character of the land — When and to what extent involved in adverse proceedings.
678. Requirements and contents of adverse claim — Question for land department alone.
679. Time within which must be filed — Statute mandatory — Period cannot be extended, even by stipulation (note).
680. Who may adverse — Confined to conflicting surface.
681. Who must adverse — Any adverse claimant as to surface.
682. Who need not adverse — Town-site owners — Known lode owner.
683. Same — The rule as to tunnel claimants — No need to adverse.
684. Effect of adverse claim.
685. Exception where conflict area excluded by amendment.

§ 675. Distinction between adverse claim and protest.— There is a vast distinction between adverse claims and protests, though they are sometimes spoken of as synonymous, and at other times the terms "protest and adverse claim" are used as a phrase, as though both were necessary to express the nature of the proceeding. While the adverse claimant is a protestant, to the extent that he appears and protests, or objects to the issuance of a patent, the protestant need not be an adverse claimant. A mere protestant need not be an interested party,[2] while an adverse claim may be maintained only by the owner of conflicting surface

[1] Rockw. Gamboa, pp. 242–253. [2] *Post*, this chapter, art. C.

ground.[1] In this chapter we will discuss the question of adverse claim, and that of protest will be taken up later.[2]

§ 676. Nature and purpose of adverse claim.— An adverse claim is in the nature of a proceeding *in rem* to determine the rights of the parties to the possession of certain portions of conflicting surface ground described, and to stay the further prosecution in the land office of the application for patent until its determination.[3] The rights of the parties to conflicting surface ground are the only proper subject of adverse claim,[4] possible future conflicts of subsurface rights being questions to be settled in a proper action when they arise.[5] A correct disposition of the question, however, involves the further one, namely, which, if either of the parties, is entitled to a patent from the United States. As said in a late case in the federal court: "Frequently the party has the right to the possession and not to a patent. He is entitled to the possession as soon as he properly locates the claim, but not to patent until he shall have done the necessary work."[6]

§ 677. Character of the land — When and to what extent involved in adverse proceedings.— Whether or not the land is mineral or non-mineral in character is not a proper question to be raised collaterally in adverse proceed-

[1] See *post*, § 680.

[2] *Post*, art. C.

[3] Hamilton v. Southern Nevada G. M. Co., 83 Fed. Rep. 362; Providence G. M. Co. v. Burke (Ariz.), 57 Pac. Rep. 641; Marshall S. M. Co. v. Kirtley, 13 Colo. 410, 21 Pac. Rep. 492; Wolfley v. Lebanon M. Co., 4 Colo. 112; Wight v. Dubois, 21 Fed. Rep. 693.

[4] Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78, 16 Pac. Rep. 513; Providence G. M. Co. v. Burke, *supra;* Choller, Potosi and Bullion Lodes v. Julia Lode, Copp's Min. Lands, 93; Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356; New York Hill Co. v. Rocky Bar Co., 6 L. D. 318; Eureka M. Co. v. Pioneer Cons. M. Co., 8 C. L. O. 106. See *post*, § 692.

[5] Champion M. Co. v. Cons. Wyoming G. M. Co., *supra;* Lee v. Stahl, 13 Colo. 174, 22 Pac. Rep. 436; notes 3 and 4, *ante*.

[6] Rutter v. Shoshone M. Co., 75 Fed. Rep. 37; affirmed, 31 C. C. A. 223, 87 Fed. Rep. 801; Providence G. M. Co. v. Burke, *supra*.

ings nor in any case solely between mineral claimants. It can only be raised in a direct proceeding brought for that specific purpose, and by a non-mineral claimant against a mineral claimant, or *vice versa*. In such case the land department may order a hearing, and the proceedings will then be suspended until the question is determined.[1] This is exclusively within the jurisdiction of the land department, and in the determination of it the latter is unhampered by the decisions of the courts.[2] It has, however, been raised collaterally in the land department.[3] If, however, the adverse is by a non-mineral claimant against the mineral applicant, of course the character of the land becomes a material question and is properly raised in adverse proceedings.

§ 678. Requirements and contents of adverse claim — Question for land department alone.— Generally the adverse claim must state facts sufficient, if true, to entitle the adverse claimant to the ground in conflict.[4] The statute requires that it shall be made upon the oath of the person filing it, and shall show the nature, boundaries and extent of such adverse claim.[5] This must be set forth fully in the notice, which should also show whether the adverse party claims as purchaser or as locator. In the latter case, a certified copy of the original location notice or certificate should accompany the notice; in the former, he should, in addition to this, furnish an abstract of title duly certified.[6] The ad-

[1] Alice Placer Lode, 4 L. D. 814; Devereaux v. Hunter, 11 L. D. 214; Powell v. Ferguson, 28 L. D. 173; Snyder v. Waller, 24 L. D. 11; Wallace v. State of California, 5 C. L. O. 22; Wood v. Seymour, 4 C. L. O. 178; A. D. Searle Placer, 9 C. L. O. 180.

[2] Steele v. St. Louis Sm. & Ref. Co., 106 U. S. 447; Barden v. N. P. R. R. Co., 19 L. D. 188; Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641; Snyder v. Waller, *supra;* Overman S. M. Co. v. Maxwell, 10 C. L. O. 191.

[3] Anderson v. Amador & Sacramento Canal, 10 L. D. 572.

[4] Mono M. Co. v. Magnolia E. & W. Co., Sickels' Min. Dec., 198, 2 C. L. O. 68; Copp's Min. Lands, 146, 153.

[5] R. S. U. S., § 2326; Gen. L. O. Cir., June 24, 1899, pars. 80, 83.

[6] Id. See also McFadden v. Mount-

verse claimant should also furnish a plat showing his entire claim, its relative situation or position with the one against which he claims, and the boundaries and extent of the conflict.[1] This latter requirement may be dispensed with where both parties are claiming by legal subdivisions.[2]

The adverse claim must be sworn to by the applicant, where there is only one; by one for all where there are several, or by his or their agent or attorney who is familiar with the facts.[3] The sufficiency of the adverse claim is solely one for the land department, and will not be interfered with by the courts. The department will be satisfied with it, whatever its form, if it shows clearly the existence of a substantial right; the controlling principle being that the department is only concerned in seeing that the law is complied with and that the patent finally passes to one entitled to it.

§ 679. Time within which must be filed — Statute mandatory — Period cannot be extended even by stipulation (note).— The adverse claim must be filed in the land office where the application for patent is pending within sixty

ain View M. & M. Co., 27 L. D. 358; Hallett & Hamburg Lodes, 27 L. D. 104; Anchor v. Howe, 50 Fed. Rep. 366; War Eagle Mine, Copp's Min. Lands, 113; Mountain Tiger, Zella and Rockwell Lodes, Copp's Min. Lands, 116; Robinson v. Mayger, 9 C. L. O. 5; Little Pauline Lode v. Leadville Lode, 7 L. D. 506; Hoffman v. Beecher, 13 Mont. 489, 31 Pac. Rep. 92; L. O. Cir., June 24, 1899, par. 83; Gwillim v. Donnellan, 115 U. S. 45.

[1] L. O. Cir., *supra*, par. 84; Reno v. Old Kentucky G. M. Co., Com'r to Durango Office, Jan. 20, 1896; Bates v. Chambers, 1 C. L. O. 98; Jackson v. Tiger M. Co., Sickels' Min. Dec. 263; War Eagle Mine, *supra*. Where an official survey is impracticable, the conflict area may be shown by an unofficial survey. Hoffman v. Beecher, *supra;* Philadelphia M. Co. v. Finley, 10 C. L. O. 340; Sec'y to Com'r McFarland, Copp's Min. Lands, 331; Jennie Lind M. Co. v. Eureka M. Co., Copp's Min. Lands, 124. Where no plat is furnished, a good excuse for its omission should be shown by affidavit. Sec'y to Com'r McFarland, *supra*.

[2] Reg. Gen. L. O., *supra*, par. 84.

[3] R. S. U. S., § 2326; Gen. L. O. Cir., *supra*, pars. 81, 82; Samuel McMaster, 2 L. D. 706; Hawley Cons. M. Co. v. Memnon M. Co., Sickels' Min. Dec. 235; Equator Lode, Copp's Min. Lands, 178; Jennie

days from the date of the first publication of the notice.[1] Inasmuch as this is a statutory proceeding, strict compliance with this rule is essential, and a failure to file the adverse claim within that time is a waiver of the right.[2] It is of no consequence that by different views of the department as to the period of publication, the latter may extend beyond or fall short of that period; the time for filing the adverse claim cannot be extended or cut off. In the computation of this time the first day of the period of publication is excluded, and the adverse claimant is allowed the whole of the last day within which to file his notice.[3] Where the last day falls on Sunday or a holiday he is allowed the next succeeding business day.[4] This upon the familiar rule that he has not the full time by any other mode of computation, and the rule otherwise would be to cut off a portion of the time

Lind M. Co. v. Eureka M. Co., Copp's Min. Lands, 124; Nesbett v. De Lamar's Nevada Gold M. Co. (Nev.), 53 Pac. Rep. 178.

[1] R. S. U. S., § 2326; Tiernan v. Salt Lake M. Co., 1 C. L. O. 25; Nellie Lode v. Texas Lode, 14 L. D. 180; Davidson v. Eliza G. M. Co., 28 L. D. 224; Marshall Silver M. Co. v. Equator M. & S. Co., Copp's Min. Lands, 178; Snowflake Lode, 4 L. D. 80; Great Western Lode, 5 L. D. 510; Miner v. Mariott, 2 L. D. 709; Ground Hog v. Parole M. Co., 8 L. D. 430; Ledger Lode, 16 L. D. 101; Bonesell v. McNidder, 13 L. D. 286; Pride of the West Mine, Copp's Min. Lands, 314; Hunt v. Eureka Gulch M. Co., 14 Colo. 551, 24 Pac. Rep. 550. In a solitary case the land department allowed an adverse claim to be filed during the period of publication in a weekly newspaper after the sixtieth day. Com'r to Leadville Office, Copp's Min. Lands, 261. But this is without authority of the statute and not the law.

[2] Wight v. Dubois, 21 Fed. Rep. 693; Hunt v. Eureka Gulch M. Co., *supra;* Tiernan v. Salt Lake M. Co., *supra;* Davidson v. Eliza G. M. Co., *supra;* Whitman v. Holtenhoff, 19 L. D. 245; Overman v. Dardenelles, Copp's Min. Lands, 98; Marshall S. M. Co. v. Equator M. Co., Copp's Min. Lands, 178. And this period cannot be extended by stipulation between the parties. Lincoln Lode, Copp's Min. Lands, 257; Tilden v. Intervenor M. Co., 1 L. D. 572; Haglind, 1 L. D. 591. See also Independence Lode, 9 L. D. 571; Mattingly v. Lewisohn, 8 Mont. 259, 19 Pac. Rep. 310; Steel v. Gold Lead G. & S. Co., 18 Nev. 80, 1 Pac. Rep. 448.

[3] Jamie Lee Lode v. Little Forepaugh, 11 L. D. 391.

[4] Waterhouse v. Scott, 13 L. D. 718; Ground Hog Lode v. Parole & Morning Star Lode, 8 L. D. 430. See also Satter v. Burt, 20 Wend. 205.

which the statute gives him; and while it is legal for officers to receive and file it on a holiday,[1] they are not bound to do so.

§ 680. **Who may adverse — Confined to conflicting surface.**— Any person or association claiming an interest which in any way conflicts with the claim for which patent is asked, as described in the application, whether as owner of a portion or all of the claim, under the same or a different name, or as the owner of adjoining property, a portion of the surface lines of which conflict with the surface lines of the claim applied for, may maintain an adverse claim in the land office.[2] And the older cases hold that this right extends to a tunnel claimant, where application has been made for a lode claim along the line of his tunnel, while the same is being prosecuted with diligence,[3] but the tunnel claimant need not adverse.[4] It is sometimes customary, where one co-owner files the adverse claim on behalf of several, for him to furnish at the same time special powers of attorney, authorizing him to act for his co-owners, but this is not necessary, and an application verified by one on behalf of several co-owners, with the statement that it is submitted on behalf of all, is sufficient, without any further evidence of agency.[5] The supreme court of Colorado has held that the adverse claimant should not be permitted to maintain his adverse claim, where he seeks to establish an interest in, and not adverse to, the claim of his adversary.[6] This is undoubtedly the correct rule.

[1] Sayer v. Hoosac Con. G. & S. M. Co., 6 C. L. O. 73; Dollie Varden Lode, Copp's Min. Lands, 245.

[2] Wolverton v. Nichols, 119 U. S. 435; Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819; Hamilton v. Southern Nevada Cons. M. Co., 33 Fed. Rep. 562; Marshall S. M. Co. v. Kirtley, 12 Colo. 410, 21 Pac. Rep. 492.

[3] Back v. Sierra Nevada Cons. M. Co., 2 Idaho, 385, 17 Pac. Rep. 83.

[4] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 108.

[5] Nesbitt v. DeLamar's Nevada Gold M. Co., 24 Nev. 273, 53 Pac. Rep. 178; Ayers v. Daly, 3 C. L. O. 196. See *ante*, § 678, note 3, p. 588.

[6] Doharty v. Morris, 11 Colo. 12, 16 Pac. Rep. 911. In Rockwell v. Gra-

§ 681. Who must adverse — Any adverse claimant as to surface. — The general rule is that any lode or placer,[1] mill site,[2] agricultural[3] or town-site[4] claimant, whose surface ground in any way conflicts with that of the applicant for patent to a mining claim, must file an adverse claim within the time allowed by law to protect his rights, or he waives them. It has been held that this rule applies with equal force in the case of a tunnel claimant so far as the "line" of the tunnel is concerned;[5] but the better opinion is the other way.[6] Of course the line of the tunnel is all that the tunnel claimant could use as a basis of adverse claim, since that is the only part of the surface ground which might conflict, and since sub-surface rights are not a proper sub-

ham, 9 Colo. 36, 10 Pac. Rep. 284, it was held that the holder of a mere easement does not hold such an estate as to allow him to maintain an adverse claim. As to the right of an administrator to adverse for the estate of his decedent, see *post*, § 723.

[1] Gwillim v. Donellan, 115 U. S. 45; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819; Rose v. Richmond M. Co., 17 Nev. 25, 27 Pac. Rep. 1105; affirmed, 114 U. S. 506. See also cases cited in note 2, p. 589, § 679, *ante*. Where the owner of a lode within a placer applies for patent without mentioning the placer, the placer claimant must adverse.

[2] Shafer v. Constans, 8 Mont. 369; Warren Mill Site v. Copper Prince Lode, 1 L. D. 555; Bay State G. M. Co. v. Travillion, 10 L. D. 194; Theodore H. Becker, 5 C. L. O. 51; Becker v. Central City, 2 C. L. O. 98.

[3] Com'r to Sacramento Office, Copp's Min. Lands, 100; Anderson v. Amador & Sacramento Canal Co., 10 L. D. 572.

[4] Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; Talbott v. King, 6 Mont. 76, 9 Pac. Rep. 434; Bonner v. Meikle, 82 Fed. Rep. 697; Rico Townsite, 1 L. D. 556; Deffeback v. Hawke, 115 U. S. 392; Smoke-House Lode, 4 L. D. 555; Central City Townsite and Townsite of Silver Cliff, Copp's Min. Lands, 261-63; Young v. Goldsteen, 97 Fed. Rep. 303. While the mining claimant need not adverse the town site because the town-site patent does not carry the minerals or mining claim, if his surface rights become involved by apparent encroachment he should do so, and the lot-owner as to surface rights is said to be obliged to adverse the mineral applicant.

[5] Back v. Sierra Nevada M. Co., 2 Idaho, 386, 17 Pac. Rep. 83; Tioga M. Co., 8 C. L. O. 88, 173; Bodie T. & M. Co. v. Bechtel Cons. M. Co., Copp's Min. Lands, 308.

[6] Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108.

ject of adverse claim;[1] and, as we have seen, he loses no rights by failure to adverse,[2] our highest court having held that he is not bound to do so.[3] There is also good authority to the effect that the holder of ground under a Mexican grant must adverse the application of a mineral claimant in order to protect his rights.[4] And a purchaser of a mining claim under an execution sale must adverse the application of the judgment debtor for a patent to such claim.[5]

§ 682. Who need not adverse — Town-site owners — Known lode owner.— But the mining claimant, on the other hand, is not bound to adverse the application for a town-site patent, for the obvious reason that such claimant cannot acquire title to mineral lands in this way.[6] The owner of a known lode is not required to adverse the application of a placer owner, except in the case of a lode within the placer which is included in the application;[7] nor is a tunnel claimant bound to adverse.[8] It is also the rule that a co-owner is not obliged to adverse the application of one of his co-owners. While the land department is on both sides of this question,[9] this is the rule laid down by the courts.[10] Neither

[1] *Ante*, § 676, note 5, p. 586.

[2] Enterprise M. Co. v. Rico-Aspen M. Co., *supra*.

[3] See *post*, § 683, note 2, p. 593.

[4] McGarrahan v. New Idria M. Co., 3 L. D. 422. As to conflicting patents, see *post*, § 747.

[5] Hamilton v. Southern Nevada G. & S. M. Co., 13 Sawy. 113, 33 Fed. Rep. 562.

[6] Deffeback v. Hawke, 115 U. S. 392; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; Silver Bow M. & M. Co. v. Clark, 5 Mont. 288, 5 Pac. Rep. 570; Talbott v. King, 6 Mont. 76, 9 Pac. Rep. 434; Keystone Cons. M. Co. v. State of California, Copp's Min. Lands, 101. See § 681, note 4.

[7] R. S. U. S., § 2333; Noyes v. Mantle, 127 U. S. 348; Reynolds v. Iron Silver M. Co., 116 U. S. 687; Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

[8] Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108; *post*, § 683.

[9] Thomas v. Elling, 25 L. D. 495; Grampian Lode, 1 L. D. 544; Lucy R. Hussy Lode, 5 L. D. 93; J. Q. S. Lode, 10 C. L. O. 206; Gold Dirt Lode, 10 C. L. O. 119.

[10] Turner v. Sawyer, 150 U. S. 578, 586; Rector v. Gibbon, 111 U. S. 276, 291; Brundy v. Mayfield, 15 Mont. 201, 38 Pac. Rep. 1067; Hunt v. Patchin, 13 Sawy. 304, 35 Fed. Rep. 816.

is it necessary for the holder of a mere easement to adverse a mining application.[1]

§ 683. Same — The rule as to tunnel claimants — No need to adverse.— The United States supreme court adopts a rule somewhat at variance with previous decisions of other courts on this question, in holding that a tunnel claimant is not bound to adverse the application for patent of a lode claimant along the line of his tunnel, except as to lodes already discovered, and yet the court has the strength and force of reason to support it. The court says: "The remaining question is whether the failure to adverse the application for a patent of the Vestal claim destroyed or impaired the rights of the defendant. We think not. . . . The obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible and certain right, and not a mere possibility. . . . It seems to us that nothing was to be gained by instituting adverse proceedings, and therefore nothing lost by failure to do so."[2]

The supreme court of Montana granted an injunction restraining the lode applicant from proceeding with his patent application pending the diligent prosecution of work in the tunnel by the tunnel claimant.[3] This is a reasonable and simple application of the doctrine of "preventive justice," and no serious objection, it is believed, can be made to its application in this manner.

§ 684. Effect of adverse claim.— An adverse claim, properly made and filed within the time required by law, stays all proceedings in the land department upon the patent application, except the completion of the publication in

[1] Rockwell v. Graham, 9 Colo. 36, 10 Pac. Rep. 284.

[2] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 167 U. S. 108. See also Ellet v. Campbell, 18 Colo. 510, 33 Pac. Rep. 521; affirmed, 167 U. S. 116.

[3] Hope M. Co. v. Brown, 7 Mont. 550, 19 Pac. Rep. 218; s. c., 11 Mont. 370, 28 Pac. Rep. 732.

the newspaper and proof thereof,[1] pending the determination of the rights of the respective parties by a court of competent jurisdiction, in a suit filed within thirty days after the filing of the adverse claim in the land office.[2] The filing of suit within thirty days may be dispensed with, however, in a case where a suit is pending between the same parties involving the right of possession of the same ground, and an adverse claim is subsequently filed within the period of publication.[3] But in such case it would be necessary, by appropriate amendment, to connect the pending action with the adverse proceedings.

§ 685. Exception where conflict area excluded by amendment.— The land department has permitted the applicant to amend his application so as to exclude the area brought in conflict by the adverse proceedings, whereupon he was allowed to patent the remainder.[4] This should always be allowed, so long as his discovery and the place where his labor and improvements were performed remain within the limits of the amended application;[5] likewise if a new discovery is seasonably established.

[1] Gen. L. O. Cir., June 24, 1899, par. 86.

[2] R. S. U. S., § 2326; Gen. L. O. Cir., *supra;* Richmond M. Co. v. Rose, 114 U. S. 273; St. Louis Sm. & Ref. Co. v. Kemp, 104 U. S. 636; Gwillim v. Donnellan, 115 U. S. 45; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683; Rose v. Richmond M. Co., 17 Nev. 25, 27 Pac. Rep. 1105; Deno v. Griffin, 20 Nev. 249, 20 Pac. Rep. 308; Little Forepaugh Lode, 11 L. D. 391; Eldred v. Lacey, 6 C. L. O. 34; Clipper M. Co., 22 L. D. 527.

[3] Shoo Fly, Magnolia et al. v. Mono Lode, Copp's Min. Lands, 146, 149; Swaine v. Craven, 12 L. D. 294. See Crown Point M. Co. v. Buck, 26 L. D. 348.

[4] Branagan v. Dulaney, 2 L. D. 744; Last Chance v. Tyler, 157 U. S. 683. See *post*, § 731.

[5] Last Chance M. Co. v. Tyler M. Co., *supra;* Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284, 4 C. C. A. 329; Antediluvian Lode & Mill Site, 8 L. D. 602; Cayuga Lode, 5 L. D. 703; Lone Dane Lode, 10 L. D. 53; Spur Lode, 4 L. D. 160.

ARTICLE C.

Of the Protest, the Protestant's Rights and the Effect Thereof.

§ 691. Protest — Nature of the proceeding — When may be made.
692. Who may protest — Co-tenant's rights and duties as to protest and adverse.
693. The right to appeal.
694. Protest proceedings not necessarily *res judicata*.

§ 691. Protest—Nature of the proceeding—When may be made.— At any time prior to the issuance of patent a protest against its issuance may be filed upon any ground which tends to show that the applicant for patent has failed to comply with the law,[1] or that the land sought to be patented is not mineral land, or *vice versa* in case of agricultural applicant. The protest should be upon the oath of the person filing it, and should state tersely and specifically the facts upon which it is based.[2]

§ 692. Who may protest—Co-tenant's rights and duties as to protest and adverse.— A protest may be filed by any person, whether interested in the land or not, who is able to show any state of facts tending to show the illegality of the patent proceedings.[3] It may be filed by an adverse claimant who has lost his rights to adverse by failure to do so in time;[4] but in such case he stands in the same position as any other protestant and may not litigate any question

[1] R. S. U. S., § 2325; Gen. L. O. Cir., June 24, 1899, par. 58.

[2] 420 M. Co. v. Bullion M. Co., 3 C. L. O. 5; T. M. Empy, 10 C. L. O. 103; Bradstreet v. Rehm, 21 L. D. 80; Com'r to Missoula Office, April 25, 1893.

[3] Beals v. Cone (Colo.), 62 Pac. Rep. 948; Commissioner to Leadville Office, Copp's Min. Lands, 272; Bright v. Elkhorn M. Co., 8 L. D. 122; Dotson v. Arnold, id. 439; Martin v. Baker, 6 L. D. 763; Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356; Bradstreet v. Rehm, 21 L.D. 80.

[4] Cedar Hill M. Co. v. Jacob Little Cons. M. Co., 1 L. D. 628; Nevada Lode, 16 L. D. 532; Whitman v. Haltenhoff, 19 L. D. 245; Jupiter Mine, 4 C. L. O. 114; Kemp v. Star, 6 C. L. O. 3; Camp Bird Case, Sickles' Min. Dec. 246; Sec'y to Com'r Drummond, Copp's Min. Lands, 138.

which should have been raised by adverse proceedings.[1] And a co-owner whose name has not been included in the application for patent may protest against its issuance, setting forth the nature and extent of his interest.[2]

The general rule is that, if the adverse claim is legal in its nature and disputes the claimant's right to any part of the surface or to the title, for purely legal reasons, not involving a trust, an adverse claim should be filed. If, on the other hand, the nature of the claim is purely equitable, and the relation is such that the patent would merely confirm the title, as, for instance, a mining partner holding the title in his own name, or any other case involving a trust, the beneficiary of the trust need not adverse.[3]

§ 693. The right to appeal.— A mere protestant who has no interest in the subject-matter may not appeal.[4] But one who shows an ultimate interest in the subject-matter may appeal.[5] Such interest, of course, must be protected by the protestant himself in some suitable way, if the protest is sustained. The protest itself, even though successful, gives him no pre-emption right, but if he is in possession ready to pursue such other remedies as the law affords him he will be protected in such possession.

§ 694. Protest proceedings not necessarily res judicata. Where a party files a protest in the land office against the issuance of a patent for a mining claim, and the same is sustained, the applicant is not thereby precluded from mak-

[1] Gen. L. O. Cir., June 24, 1899, par. 58.

[2] Gen. L. O. Cir., *supra*, par. 58. See Thomas v. Elling, 25 L. D. 495.

[3] See Turner v. Sawyer, 150 U. S. 578; Thomas v. Elling, *supra*.

[4] Cedar Hill M. Co. v. Jacob Little Cons. M. Co., 1 L. D. 628; Dotson v. Arnold, 8 L. D. 439; Martin v. Baker, 6 L. D. 763; Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356; Parsons v. Ellis, 23 L. D. 69; Elda M. & M. Co. v. Mayflower G. M. Co., 24 L. D. 573; Camp Bird Case, Sickles' Min. Dec. 246; McGarrihan v. Boston Mine, id. 330; Boston Hydraulic M. Co. v. Eagle Copper Mine, id. 330; Kemp v. Starr, 6 C. L. O. 3; Com'r to Leadville Office, Copp's Min. Lands, 272.

[5] Wright v. Elkhorn M. Co., 8 L. D. 122; Nevada Lode, 16 L. D. 502.

ing a second application for the same ground;[1] the rule being that land office proceedings are *res judicata* only as to the matters appearing in the records and do not preclude the applicant from amending his proceedings, producing other and better evidence, and sustaining his claim by that means if he can, at any time before patent is issued to the land involved.

ARTICLE D.

Entry of Coal Lands.

§ 700. Mode of procedure.
701. Same — Character of the land — How determined — Development of coal.
702. Preference right — Improvements.
703. Final entry — Cash entry — Purchase price.
704. Who may enter — Quantity.
705. Same — Real party in interest — Right may be exercised but once.
706. Cancellation of entry.
707. The doctrine of this chapter restated.

§ 700. Mode of procedure.— The statute provides that coal entry must be made on the vacant, surveyed public lands of the United States by legal subdivisions.[2] To this extent its requirements are similar to those relative to agricultural rather than to other mineral lands.[3] The first step necessary is the filing of a declaratory statement, which should be upon the oath of the applicant, or if there be more than one, upon the oath of all,[4] and should set forth generally —

1. The citizenship of the applicant or applicants, and the fact that he or each of them is over the age of twenty-one years.

2. A description of the land, with reference to legal sub-

[1] Beals v. Cone (Colo.), 62 Pac. Rep. 948; Clipper M. Co., 22 L. D. 527.

[2] R. S. U. S., §§ 2347-2351; Land Office Regulations, July 31, 1882, revised to December 28, 1897, pars. 2, 6 and 7; Mitchell v. Brown, 8 L. D. 65.

[3] See generally, R. S. U. S., chs. 7, 8, 9.

[4] Gen. L. O. Regulations, *supra*, pars. 32–36.

divisions, its non-mineral character, and the statement that the applicant desires to enter it as coal land and that it is valuable as such.

3. That the applicant has never, either as an individual or as a member of any association, previously entered coal lands under the United States laws.[1] This application should be accompanied by the affidavit of two disinterested witnesses, familiar with the character of the land in question, to the effect that it does not contain, to their knowledge, any valuable vein or deposit of gold, silver or copper.[2]

These papers must all be signed and sworn to by the applicant or applicants, if there be more than one, in person. After they are properly signed and sworn to, however, they may be filed in the land office, and all other proceedings taken by a duly constituted agent or attorney.[3] And where the applicant is not familiar with the character of the land, his declaratory statement should so state, in which case the affidavit as to its character may be made by an agent familiar with all the facts; but whether made by principal or agent, it must be accompanied by the affidavit of two disinterested parties.[4]

§ 701. Same — Character of the land — How determined — Development of coal. — Before lands may be entered as coal lands, it must appear as a present fact that coal has been developed thereon in sufficient quantities to justify working it as coal land.[5] It must be shown as a present fact to be more valuable for coal than for any other purpose — and this is the guiding rule in the selection of all lands,[6] — and not to contain any valuable vein or deposit of

[1] Land Office Reg., Dec. 28, 1897; R. S. U. S., §§ 2348–49.

[2] Land Office Reg., *supra*, pars. 10, 35.

[3] Ayers v. Daly, 8 C. L. O. 196; Land Office Reg., *supra*, par. 34.

[4] Land Office Reg., *supra*, par. 35. Forms in such cases are to be found in Appendix "D."

[5] Walker v. Taylor, 28 L. D. 110. See authorities cited in notes to last section *ante*.

[6] Hamilton v. Anderson, 19 L. D. 168; Comm'rs of Kings County v. Alexander, 5 L. D. 126; Smith v. Buckley, 15 L. D. 321; Jones v. Driver, 15 L. D. 514.

gold, silver or copper;[1] and proof of the development of coal in the vicinity is not sufficient.[2] But it is not necessary that coal be developed on each forty-acre tract.[3] Nor is it necessary that the improvements required by statute be placed upon a subdivision containing coal.[4]

Lands containing coal are classed as mineral lands under the statute which prohibits the selection of mineral lands as state school or railway lieu lands.[5] The determination of the character of the land, prior to the final entry and issuance of patent, is entirely for the land department.[6]

§ 702. Preference right — Improvements.— The statute gives to those who have opened and improved coal mines on the public lands of the United States a preference right to enter and purchase the same.[7] But in order to secure the benefits of this privilege such person must file a declaratory statement within sixty days from the date of actual possession and improvements thereon.[8] Persons claiming the benefits of this preference right must be in actual possession of the premises in question, and must have made sufficient improvements thereon to indicate good faith.[9] In case of conflicting claims, where improvements have been com-

[1] Land Office Regulations, revised to December 28, 1897, par. 10.

[2] Kings Co. Com'rs v. Alexander, 5 L. D. 126; Dughi v. Harkins, 2 L. D. 721; Williams, 11 L. D. 462; Scott v. Sheldon, 15 L. D. 361; Frees v. State of Colorado, 22 L. D. 510.

[3] Hamilton v. Anderson, 19 L. D. 168; McWilliams v. Green River Coal Ass'n, 23 L. D. 127; Rucker v. Knisley, 14 L. D. 113.

[4] McWilliams v. Green River Coal Association, *supra*.

[5] Mullan v. United States, 118 U. S. 271; Ivanhoe M. Co. v. Keystone Cons. M. Co., 102 U. S. 167.

[6] Barden v. Northern Pacific R. Co., 154 U. S. 288, 327–330; Steel v. St. Louis Sm. & Ref. Co., 106 U. S. 447, 450; Heath v. Wallace, 138 U. S. 573, 585; Cowell v. Lammers, 10 Sawy. 246, 257; C. P. Ry. Co. v. Valentine, 11 L. D. 238, 246.

[7] R. S. U. S., § 2348.

[8] R. S. U. S., § 2349. For contents of declaratory statement, see *ante*, § 700; Brennan v. Hume, 10 L. D. 160; O'Gorman v. Mayfield, 19 L. D. 522; Anthracite Mesa Coal Co., id. 18.

[9] James D. Negus, 11 L. D. 32; Walter Dearden, 11 L. D. 351; Brennan v. Hume, *supra;* Watkins v. Garner, 13 L. D. 414; Ackert, 17 L. D. 268; Poire v. Markham, 21 L. D. 197.

menced, the preference right to purchase is determined by priority of possession and improvements;[1] and in case of such conflict, where one party fails to complete his entry, his improvements inure to the benefit of his adversary.[2]

§ 703. Final entry — Cash entry — Purchase price.— Within one year from the date of filing the declaratory statement the applicant must make final entry thereof under the provisions of the rules of the land department or forfeit his right. This is done by filing with the register a statement, sworn to by the applicant, setting forth substantially the same facts as are contained in the declaratory statement, and further setting forth the nature and value of the improvements placed on the ground. It must be accompanied by the affidavit of two disinterested witnesses, who are familiar with each legal subdivision of the land in question, that it contains no vein or deposit of gold, silver or copper, and is principally valuable for coal.[3] Upon making this proof to the satisfaction of the department, the applicant will be permitted to pay the purchase price, and the receiver's receipt will thereupon issue.[4]

Pursuant to the provisions of the statute[5] the department permits what it terms a "private entry," which consists of the affidavit of the applicant, setting forth his qualifications to receive patent, together with such facts regarding the character of the land as are required in the case of an entry upon a previously filed declaratory statement, and also show-

[1] R. S. U. S., § 2351; Cummings v. Lessinger, July 1, 1896; Bullard v. Flannagan, 11 L. D. 516; Poire v. Markham, 21 L. D. 197; Broad v. Ray, 20 L. D. 422.

[2] Ouimette v. O'Connor, 23 L. D. 243.

[3] R. S. U. S., § 2350; Land Office Reg., July 31, 1892, revised to Dec. 28, 1897, para. 31, 32; Adolph Peterson, 6 L. D. 871; N. P. Coal Co., 7 L. D. 422; O'Gorman v. Mayfield, 19 L. D. 522. The claimant will be permitted to make final entry after one year from the date of filing his declaratory statement, if no adverse rights have intervened. Alfred Grunsfield, 10 L. D. 503. But he cannot prolong his right to make final entry by a subsequent declaratory statement. Id.; Connor v. Terry, 15 L. D. 310; Anthracite Mesa Coal Co., 19 L. D. 310.

[4] L. O. Reg., *supra*, par. 32.

[5] R. S. U. S., § 2347.

ing that no portion of the tract is in the possession of any other party. Upon filing this affidavit, corroborated by the affidavit of two disinterested witnesses as to the character of the land, the applicant will be permitted to pay the purchase price and enter the land without having previously filed a declaratory statement.[1]

The purchase price of coal lands is ten dollars per acre where situated more than fifteen miles from any completed railroad, and twenty dollars per acre where situated within fifteen miles of such completed railroad.[2] This has reference to the distance from a completed railroad at the date of final entry.[3]

§ 704. Who may enter — Quantity.— The United States allows its vacant coal lands to be entered only by citizens, and those who have declared their intention to become such, over the age of twenty-one years.[4] The maximum amount which may be so entered is one hundred and sixty acres for one person, or three hundred and twenty acres for an association of persons, each of whom must be severally qualified.[5] There is a proviso in the statute to the effect that where an association of persons, not less than four in number, each of whom is qualified as above, have expended not less than five thousand dollars in labor and improvements on vacant coal land, such association may be permitted to make entry of not to exceed six hundred and forty acres of land, including such improvements.[6] But the land department has placed

[1] Reg. Land Office, Dec. 28, 1897, para. 23, 24, 35.

[2] R. S. U. S., § 2347; Land Office Reg., *supra*, par. 12. Land partly within and partly beyond fifteen miles from a completed railroad must be paid for at the maximum rate. Id., § 14.

[3] Reg. Land Office, *supra*, par. 12; Frank Foster, 2 L. D. 730; Joseph L. Colton, 10 L. D. 422: Edward B. Largent, 13 L. D. 397: Allen L. Burgiss, 24 L. D. 11. Where application is made to purchase land at $10 per acre, he must furnish proof by two disinterested witnesses, in addition to his own oath, that it is more than fifteen miles from a completed railroad. Reg. Land Office, *supra*, par. 13.

[4] R. S. U. S., § 2347.

[5] Id., and § 2348; Cir. Gen. L. O., June 24, 1899, pars. 6 and 7.

[6] R. S., § 2348; L. O. Cir., *supra*, par. 8.

a construction on this proviso which practically nullifies it, by refusing to allow such an association of persons to file a declaratory statement for a section of land without proof of the previous expenditure of five thousand dollars in labor and improvements on it.[1] The learned author of this opinion seems to have entirely overlooked the potent fact that a declaratory statement is in no sense an entry. It is only what its name would imply, a declaration under the oath of the applicant, describing the land and asking permission to open and improve it with a view to *entering* and patenting it later, and asking for the protection guaranteed by statute for not to exceed one year pending such entry.[2] And the only protection which the claimants have while engaged in the expenditure of money in such labor and improvements, aside from the sixty days allowed by statute for the possession,[3] is that afforded by this declaratory statement.[4] By filing this statement for a section of land, the four persons are doing jointly only what they could do severally by each declaring for a quarter-section, or either two for a half-section (and that too without the expenditure of any specified sum of money in improvements, except to merely develop coal thereon), namely, reserving a section of the vacant coal lands of the United States from entry by anyone else for the period of one year. No sane person would think of undertaking to proceed to final entry without proof of these improvements, but to hold that a declaratory statement will not be received without such proof is a construction of the statute which its language does not warrant. We think this, like many other freaks of statutory construction which have emanated from that department, as soon as the matter is given mature and proper consideration, will be overruled.

§ 705. Same — Real party in interest — Right may be exercised but once. — As previously intimated, all pro-

[1] Com'r to Reg. & Rec. Yankton, South Dakota, July 28, 1892; In re Appeal of Carl Johnson et al.; affirmed, 17 L. D. 411.

[2] See *ante*, § 702.

[3] R. S. U. S., § 2348.

[4] Id., and § 2347.

ceedings to enter coal lands must be taken by the real person in interest and on his own behalf;[1] and an entry made by one person for the use of any other will be canceled.[2] The right to act by agent or attorney only extends to the filing of papers and the paying of the purchase price.[3] Unlike the procedure in the acquisition of title to placer and lode claims, the right of the applicant for coal lands is confined to but one entry,[4] and this provision extends to associations to the extent of depriving any association or corporation, any member of which has previously exercised the right, of the privilege to make entry until the disability is removed.[5]

§ 706. Cancellation of entry.— An entry of coal lands is liable to cancellation for any failure on the part of the applicant to comply with the provisions of the statute or the regulations of the land department in regard thereto.[6] It may also be canceled for fraud in its procurement.[7] The question of the cancellation of mining patents generally is discussed in another part of this work.[8]

§ 707. The doctrine of this chapter restated.— It will be observed from the foregoing sections that there is a similarity in the proceedings in our application for patent and the application to register the claim under the Mexican law. The applicant for patent must post the diagram and notice of his application in a conspicuous place upon the

[1] United States v. Trinidad Coal & C. Co., 137 U. S. 160; Moffat v. United States, 112 U. S. 24; Kerr v. Utah-Wyoming Imp. Co., 2 L. D. 727; McDaniel v. Bell, 9 L. D. 15; Northern Pac. Coal Co., 7 L. D. 422; Adolph Peterson, 6 L. D. 371; Johnson v. South Dakota, 17 L. D. 411.

[2] United States v. Trinidad C. & C. Co., *supra;* Moffat v. United States, *supra;* Northern Pac. Coal Co., *supra;* Gerard B. Allen, 8 L. D. 140; McGillicuddy v. Tompkins, 14 L. D. 633; Connor v. Terry, 15 L. D. 310; Union Coal Co., 17 L. D. 351; E. R. Stafford, 21 L. D. 300.

[3] Land Office Regulations, Dec. 28, 1897, par. 34; Ayers v. Daly, 3 C. L. O. 196.

[4] R. S. U. S., § 2350; Land Office Reg., *supra*, par. 9; United States v. Trinidad C. & C. Co., *supra.*

[5] R. S. U. S., § 2350; Land Office Reg., *supra*, par. 9; United States v. Trinidad C. & C. Co., *supra.*

[6] See note 3, p. 600, § 703. *ante.*

[7] See notes 1 and 2, § 705, *ante.*

[8] See *post*, ch. V, art. C, this Part.

claim; it will not do to hide it away in a tunnel or shaft, or lock it up in a cabin. It must be posted at a place where it can be readily seen and observed. Unless there is a more conspicuous place, the point of discovery will ordinarily be sufficient. But if there is a shaft-house upon the claim, it will be sufficient to post it upon that. The proof of posting must be filed with the application for patent.

In the notice posted upon the claim the claim must be described according to the metes and bounds of the diagram. The adjoining or contiguous claims must also be given, if any there be, and the page and book of the record.

The application must be made by a party or a lawfully authorized agent, and when by a corporation by a duly authorized attorney in fact; and in each case the postoffice address of the person or agent must be given. The citizenship may be proven by the affidavit of the applicant, or a certificate of naturalization if made by an agent, and in the case of corporations a copy of the certificate of incorporation must be filed showing an incorporation under some one of the states or territories, which is considered equivalent to citizenship.

The notice must be published in a newspaper and posted in the land office during the period of sixty days. The department now holds that nine publications in a weekly newspaper, and the expiration of sixty days from the first, is sufficient to bar an adverse claim. But it is to be observed that this upon its face is not a compliance with the statute under the general rules of publication.

The publication must be had in the nearest newspaper to the claim, and this generally means by air line, although there are some decisions in the land office holding that measuring by traveled route is sufficient.

There is a wide discretion as to newspapers published in the same town; but the newspaper must be a reputable one and in general circulation.

If no adverse claim is made during the sixty-days period of publication it will be presumed that none exists, and the applicant may proceed to final entry, which is done by mak-

ing proof of the publication of the notice by the affidavit of the publisher, proof that the plat and notice remain posted, proof of five hundred dollars improvements, if not made before, abstract of title brought down to date, showing title in the applicant seeking to make the purchase, the application for purchase and certificate of no suits pending; or if an adverse suit has been filed, proof of its dismissal, or the judgment roll showing the interest to which the applicant is entitled.

Placer applications, with the necessary changes, are made in the same way. If there is a known lode in the placer at the time of the application, the applicant does not get it unless he applies for it, which he may do, but several applications may be made of the placer and the lode.

There is considerable contrariety of opinion as to what is meant by "known lode." But the better and prevailing rule seems to be that it must be known to the applicant, or have been located and of such common knowledge in the community as to justify the inference that he must have known; and the time of knowledge must refer to the date of the application.

The receiver's receipt is itself a muniment of title sufficient to excuse the further performance of annual labor, as the application for patent has the effect to withdraw the claim from the public domain.

If, however, an adverse claim is filed it must be under oath and must set forth the nature and extent of the adverse claim, and should be accompanied by a plat showing the conflict, duly certified to. It must be filed within sixty days after the first publication of the notice; and while, as a general rule, the register and receiver are not bound to do business elsewhere than at their office, and may have reasonable office hours, yet an adverse claim actually received by either one of them before midnight of the sixtieth day would be sufficient.

An adverse claim may be filed only by a person claiming a conflicting area with the land applied for and relating only to surface rights, or by a person claiming a portion of

the title to the claim applied for by reason of error in the chain of title.

One running a statutory tunnel need not in general adverse, but may do so to protect the line of his tunnel. The sufficiency of an adverse claim is a question for the land department, into which the courts will not inquire. The effect of an adverse claim is to suspend all further proceedings in the land office pending the adjudication of the rights of the adverse claimant.

A protest differs from an adverse claim in that it may be filed at any time before patent is actually issued, and by one claiming no adverse interest to the applicant. In general it only puts in issue the question as to whether the applicant has complied with the statute, and the character of the land. It is the duty of the land department to give all protests respectful, proper and due consideration.

Lands chiefly valuable for coal, and not containing any valuable vein or deposit of gold, silver or copper, may be entered in legal subdivisions by citizens of the United States over twenty-one years of age, in quantities not to exceed one hundred and sixty acres for each person, or three hundred and twenty acres for an association, each member of which must be severally qualified. Associations containing not less than four persons, each qualified to make entry, having first made improvements to the extent of five thousand dollars in value, may enter not to exceed six hundred and forty acres, including such improvements. Unlike the law relative to other mineral lands, the right to enter coal lands may be exercised but once. A preference right is given to persons in actual possession who have made improvements, provided a declaratory statement be filed within sixty days. Entry must be made within one year from the filing of the declaratory statement. A cash entry, without the filing of a declaratory statement, may be made at any time by persons properly qualified. The purchase price of coal lands is ten dollars per acre if more, and twenty dollars per acre if less, than fifteen miles from a completed railroad.

CHAPTER III.

OF THE PROCEEDINGS IN COURT ON THE ADVERSE CLAIM.

ARTICLE A.

Jurisdiction of Courts.

§ 708. Jurisdiction over adverse suits — The federal question.
709. Court of competent jurisdiction — No new jurisdiction conferred — Statute provides for kind of judgment, not for particular court.
710. Jurisdiction over adverse suit primarily in state court.
711. Jurisdiction, where first commenced — Removals.
712. Adverse suit — Must be commenced within thirty days.
713. When the adverse suit is deemed commenced.
714. Nature and purpose of the action — Who has complied with law and entitled to patent.
715. Form of the action — Legal — Equitable.
716. Right to a jury trial — When waived — Common-law jury.

§ 708. Jurisdiction over adverse suits — The federal question.— The questions involved in adverse suits are generally those of fact, or of mixed law and fact, that is to say, which of the parties has complied with the law so as to entitle him to a patent, and is first in time. Formerly, as we shall show in the next section, it was generally thought that these cases involved a construction of a federal statute to such an extent as to justify the position that a federal question could be fairly said to be in issue. Essential, however, to this question, as now decided by the supreme court of the United States, it is not sufficient that one or the other or both of the parties base their right upon the fact of compliance with a law of congress, but it must, in part at least, arise out of a controversy or dispute between the parties as to the application or effect of the constitution or laws of the United States upon the facts involved.[1] And it is said that the

[1] Shoshone M. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864. See also Little York Gold Washing Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 565.

jurisdiction does not exist, nor can a cause be removed from a state court to the federal court, simply because in the course of the litigation it becomes necessary to give a construction of the constitution or laws of the United States, but that the decision of the case must depend upon such construction.[1] A further criticism or examination of this question would be foreign to the purposes of this work.

§ 709. Court of competent jurisdiction — No new jurisdiction conferred — Statute provides for kind of judgment, not for particular court.— There has been some sentiment wasted, by at least one court, upon the supposed action of congress in conferring jurisdiction of adverse suits upon federal courts,[2] but the criticism is groundless and unwarranted, and the best reasoned cases hold that the statute makes no attempt to confer any new jurisdiction upon any court. It merely provides for the trial of the adverse claim and the rights of the parties to the land in dispute in a court of competent jurisdiction.[3] The purpose of the statute is well reasoned out by the supreme court of Nevada in one of the cases just cited, wherein it is held that the object of the law is merely to require that the parties institute such proceedings in the proper court as they might under the different forms of action therein elect, and which the local practice permits; no different jurisdiction or form of action being required by the federal statute.[4]

[1] Blackburn v. Portland G. M. Co., 175 U. S. 571, 44 L. ed. 276; Little York Gold Washing & Water Co. v. Keyes, 96 U. S. 199, and cases cited; McStay v. Friedman, 92 U. S. 728, 23 L. ed. 767.

[2] Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. Rep. 1047. See Ex parte Knowles, 5 Cal. 300.

[3] R. S. U. S., § 2326; Quigley v. Gillett, 101 Cal. 462, 35 Pac. Rep. 1041; Iba v. Central Ass'n of Wyoming, 5 Wyo. 355, 42 Pac. Rep. 20, 40 Pac. Rep. 527; Chambers v. Harrington, 111 U. S. 350; Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; 420 M. Co. v. Bullion M. Co., 9 Nev. 240; Rose v. Richmond M. Co., 17 Nev. 25, 27 Pac. Rep. 1105.

[4] 420 M. Co. v. Bullion M. Co., *supra*.

§ 710. Jurisdiction over adverse suits primarily in state court.— The question as to the forum in which the rights of the parties in adverse suits should be litigated has caused considerable dispute, many courts in both the eighth and ninth circuits holding that the jurisdiction over these actions was properly in the federal court, because the right asserted is one arising under the laws of the United States. The late Mr. Justice Miller was largely responsible for the trend of judicial opinion in this direction, because of an early decision wherein he reviewed the general statute of 1875, and expressly held that these cases necessarily arose under the laws of the United States, and the federal court had jurisdiction of the action and the same was properly removed thereto, and refused the motion to remand.[1] Following this case, although not without protest and contrary decisions, the jurisdiction of the federal courts was upheld in many cases.[2] But this sentiment, whether strong or weak, was finally settled by the authoritative decision of the supreme court of the United States in two cases, in one of which the court makes use of these words to illustrate its decision: "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done under such authority is disputed."[3] And the court denied jurisdiction over this class of cases merely upon the ground of the federal question. In another case the same question was involved, and although the jurisdiction had been

[1] Frank G. & S. M. Co. v. Larimer M. & S. Co., 8 Fed. Rep. 724.

[2] Trafton v. Nougues, 4 Sawy. 178, 24 Fed. Cas. 123; 420 M. Co. v. Bullion M. Co., 9 Nev. 240; Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801, 31 C. C. A. 223, affirming s. c., 75 Fed. Rep. 87; Strasburger v. Beecher, 44 Fed. Rep. 209, 213; Wise v. Nixon, 76 Fed. Rep. 8. *Contra*, Murray v. Bluebird M. Co., 45 Fed. Rep. 885.

[3] Blackburn v. Portland M. Co., 175 U. S. 571, 584, quoting from Cook County v. Calumet, etc. Canal & Dock Co., 138 U. S. 653, 34 L. ed. 1116. See also Bushnell v. Crooke M. & S. Co., 148 U. S. 682; Gillis v. Stinchfield, 159 U. S. 658; Colorado Central Cons. M. Co. v. Turck, 150 U. S. 138.

upheld in the circuit court for the district of Idaho[1] and affirmed by the circuit court of appeals for the ninth circuit,[2] the court, speaking through Mr. Justice Brown, adhered to the former rule laid down by it,[3] and denied the jurisdiction. In the course of its observations the court took occasion to lay down the well-known proposition that inasmuch as these cases, as a general rule, only involve disputed questions of fact and the application of local rules, customs and statutes, it is therefore erroneous to suppose that they necessarily involve questions arising under the constitution or laws of the United States.[4]

The law may therefore be said to be settled that unless there is a diversity of citizenship as to the parties, and by this is meant the real parties rather than merely nominal parties, the jurisdiction is in the state court. Of course where there is a diversity of citizenship and the value of the subject-matter exceeds two thousand dollars, the jurisdiction is properly in the federal court, and by proper allegations an adverse suit may be commenced there or removed to such court, as shown in the next section.

§ 711. Jurisdiction, where first commenced — Removals. — The court, whether state or federal, in which the action is first properly commenced, has jurisdiction to try and determine it;[5] the state court by the right of its general jurisdiction, and the federal court only where the facts stated in the complaint or bill show a diversity of citizenship. Where it is properly commenced in the federal court, that court has exclusive jurisdiction over it, and there is no

[1] Rutter v. Shoshone M. Co., 75 Fed. Rep. 87.

[2] Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801.

[3] Blackburn v. Portland M. Co., 175 U. S. 571.

[4] Shoshone M. Co. v. Rutter, 177 U. S. 505. See also Bluebird M. Co. v. Murray, and Murray v. Bluebird M. Co. (three cases), but especially the one on page 385 of 45 Fed. Rep. See also Bushnell v. Crooke M. & S. Co., *infra*.

[5] 420 M. Co. v. Bullion M. Co., 9 Nev. 240; Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801, 31 C. C. A. 223; Bushnell v. Crooke M. & S. Co., 148 U. S. 682. But see Frank G. & S. M. Co. v. Larrimer M. & S. Co., 8 Fed. Rep. 72.

ground upon which it may be removed to a state court.[1] But where it is originally commenced in the state court, it may be removed to the federal court only upon the ground of diversity of citizenship of the parties, provided the amount involved is sufficient to bring it within the jurisdiction of the federal court.[2]

§ 712. Adverse suit — Must be commenced within thirty days.— Within thirty days from the filing of his adverse claim in the land office, the adverse claimant must begin a suit to determine the rights of the respective parties in a court of competent jurisdiction.[3] The statute makes it mandatory that this suit be filed within this period, and no extension of the time, either by stipulation of the parties, by order of court, or for any other purpose, will be permitted.[4] A failure to file it within the statutory period is an absolute waiver of the adverse claimant's rights.[5] But the failure of the adverse claimant to bring the action in time must be taken advantage of by special plea.[6]

§ 713. When the adverse suit is deemed commenced.— The action is deemed to be commenced when the requirements of the law, of the state or federal district where suit

[1] Chambers v. Harrington, 111 U. S. 350; Shoshone M. Co. v. Rutter, *supra;* Wise v. Nixon, 76 Fed. Rep. 8; Strasburger v. Beecher, 44 Fed. Rep. 213; Burke v. Bunker Hill & Sullivan M. Co., 46 Fed. Rep. 644.

[2] Inez M. Co. v. Kinney, 39 Fed. Rep. 832; R. S. U. S., 639; 25 Stat. at L. 433.

[3] R. S. U. S., § 2326.

[4] Steves v. Carson, 42 Fed. Rep. 821; Marshall Silver M. Co. v. Kirtley, 12 Colo. 410; Rose v. Richmond M. Co., 17 Nev. 25; Richmond M. Co. v. Rose, 114 U. S. 576; Providence G. M. Co. v. Marks (Ariz.), 60 Pac. Rep. 938; Bodie T. & M. Co. v. Bechtel Cons. M. Co., Copp's Min. Lands, 318, 321; Pride of the West Mine, Copp's Min. Lands, 214; Brannagan v. Dulaney, 2 L. D. 714; Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 271; Scott v. Maloney, 22 L. D. 274; Mars v. Oro Fino M. Co., 7 S. Dak. 605, 65 N. W. Rep. 19.

[5] 420 M. Co. v. Bullion M. Co., 9 Nev. 240; Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, 9 Fed. Cas. 592; Rose v. Richmond M. Co., *supra;* Bodie T. M. Co. v. Bechtel, *supra;* Pelican Lode, Copp's Min. Lands, 126; Nichols v. Becker, 11 L. D. 8; Nettie Lode v. Texas Lode, 14 L. D. 180.

[6] Providence G. M. Co. v. Marks, *supra.*

is brought, as to what constitutes the commencement of an action, have been complied with.[1] If it is brought in the state court, the question as to whether it has been duly commenced within the required time is one exclusively within the jurisdiction of such state court, and cannot be reviewed by the land department or federal court.[2] In most states the statute provides that an action is commenced by the filing of the complaint or petition; in others, the issuing of a summons thereon is a further requirement before the action is deemed to have been commenced. In jurisdictions where the statute allows the plaintiff a certain period, after the filing of the complaint, for the issuance and service of summons, there would seem to be no good reason why the same period should not be allowed in adverse suits, subject possibly to a motion to dismiss for want of diligent prosecution.[3]

§ 714. Nature and purpose of the action—Who has complied with law and entitled to patent.— While an adverse suit is essentially an action to determine which party has the better right to the area in conflict as against the other,[4] it also involves the further and more important question, which party, if either, is entitled to recover as against the government. And where either party fails to show title good, not only against his adversary, but also sufficient compliance with the mining laws to entitle him to a patent from the United States, he fails in the action.[5] And where both parties fail to show compliance with the United States mining laws, judgment must be rendered against both.[6]

[1] Rose v. Richmond M. Co., 17 Nev. 25, 27 Pac. Rep. 1105; affirmed, 114 U. S. 576; Mars v. Oro Fino M. Co., 7 S. Dak. 605, 65 N. W. Rep. 19.

[2] Rose v. Richmond M. Co., *supra.*

[3] Mars v. Oro Fino M. Co., *supra;* De Garcia v. Eaton, 22 L. D. 16. See *post*, § 729.

[4] Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Steele v. Gold Lead G. & S. M. Co., 18 Nev. 80, 1 Pac. Rep. 448, 450; Funk v. Sterrett, 59 Cal. 613.

[5] Jordan v. Duke (Ariz.), 53 Pac. Rep. 197; Providence G. M. Co. v. Burke (Ariz.), 57 Pac. Rep. 641.

[6] Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 190; Funk v.

§ 715. Form of the action — Legal — Equitable.— Since adverse suits are actions for the purpose of determining the rights of the respective parties to the ground in controversy, both as against each other and as against the government,[1] it follows that the form of the action may be either legal, in the nature of a suit in ejectment, or equitable, in the nature of a suit to quiet title. The latter would seem to be the proper remedy where the plaintiff is in possession of the area in conflict,[2] while the former would be the correct proceeding, if he is out of possession and seeks to oust and eject the defendant.[3] Inasmuch as the United States law relegates the trial of the adverse claim to competent courts within the district where the claim is situated,[4] it necessarily follows that the form of action provided by such local jurisdiction would be proper in adverse suits.[5] Practically all the litigation under this provision of the statute arises in the western states and territories, where the reformed procedure prevails which abolishes the distinction between legal and equitable forms of action. Under this procedure the only

Sterrett, 59 Cal. 613; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906, 21 U. S. Stat. at L. 505; Jackson v. Roby, 109 U. S. 440, 27 L. ed. 990.

[1] *Ante*, § 714.

[2] In the following cases the action was in the nature of a suit to quiet title: Perego v. Dodge, 163 U. S. 160; Parley's Park S. M. Co. v. Kerr, 130 U. S. 256; Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801, 31 C. C. A. 223; Preston v. Hunter, 67 Fed. Rep. 996, 15 C. C. A. 148; Doe v. Waterloo M. Co., 43 Fed. Rep. 219; Le Doux v. Forrester, 94 Fed. Rep. 600; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. Rep. 1047; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. Rep. 111; 420 M. Co. v. Bullion M. Co., 9 Nev. 240; Mars v. Oro Fino M. Co., 7 S. Dak. 605, 65 N. W. Rep. 19; Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. Rep. 1028.

[3] In the following cases the action was in the nature of ejectment: Gwillim v. Donnellan, 115 U. S. 45; Patterson v. Hitchcock, 3 Colo. 533; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906; Marshall S. M. Co. v. Kirtley, 12 Colo. 410, 21 Pac. Rep. 492; Lebanon M. Co. v. Cons. Rep. G. M. Co., 6 Colo. 371; Burke v. McDonald, 2 Idaho, 310, 13 Pac. Rep. 351.

[4] *Ante*, §§ 708–710; Chambers v. Harrington, 111 U. S. 350.

[5] Wolverton v. Nichols, 119 U. S. 485; Young v. Goldsteen, 97 Fed. Rep. 308; Perego v. Dodge, *supra;* 420 M. Co. v. Bullion M. Co., *supra;* Houtz v. Gisborn, 1 Utah, 173; Fulsom v. McLaughlin, id. 178.

real distinction between the forms of action is in the trial, equitable cases being before the court without a jury, and legal actions before a jury; and this is always determined from the pleadings after they are framed.

§ 716. Right to a jury trial — When waived — Common-law jury.— The courts are widely at variance on the question as to whether either of the parties to an adverse suit is entitled to a jury trial as matter of right. The courts of Colorado and Idaho go to the extreme in holding that the question being one to determine which party, if either, is entitled to the possession of the premises in dispute, the parties are entitled to a jury trial as a matter of right, regardless of the form of the pleadings or which party is in possession.[1] But this position is opposed to the better reasoning, which is to the effect that this is a purely equitable proceeding, and that at most the verdict of the jury is only advisory to the court.[2] The supreme court of Arizona pursues this question a little further and holds that, where a case is tried before a jury, the parties are not entitled to a common-law jury, but only to such as is provided by the laws of the particular jurisdiction;[3] and in that case a verdict by nine of the twelve jurors was upheld.

Of course here, as in all cases where the parties voluntarily proceed to trial without demanding a jury, they are deemed to have waived it.[4]

[1] Manning v. Strehlow, 11 Colo. 451, 18 Pac. Rep. 625; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 652; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906; Burke v. McDonald, 2 Idaho, 310, 13 Pac. Rep. 351.

[2] Hammer v. Garfield M. & M. Co., 130 U. S. 291; Perego v. Dodge, 163 U. S. 160, affirming 9 Utah, 3; Doe v. Waterloo M. Co., 43 Fed. Rep. 219; s. c., 70 Fed. Rep. 458, 17 C. C. A. 190; Preston v. Hunter, 67 Fed. Rep. 996, 15 C. C. A. 148; Shoshone M. Co. v. Rutter, 87 Fed. Rep. 801, 31 C. C. A. 223; Smith v. Richardson, 2 Utah, 424; Mantle v. Noyes, 5 Mont. 274, 5 Pac. Rep. 866; Gallagher v. Basey, 1 Mont. 461; affirmed, Basey v. Gallagher, 20 Wall. 679; Noyes v. Mantle, 127 U. S. 348.

[3] Providence G. M. Co. v. Burke (Ariz.), 57 Pac. Rep. 641.

[4] Perego v. Dodge, *supra;* Kerney v. Case, 79 U. S. 12; Bond v. Dustin, 112 U. S. 604.

Article B.

Form and Character of the Action — Pleadings and Proof.

§ 717. Pleadings — The complaint.
718. Same — The answer — The reply.
719. Necessity of pleading citizenship.
720. Same — Corporations.
721. Facts necessary to show appropriation and ownership — Right to strengthen title after suit is filed.
722. Complaint must show previously filed adverse claim.
723. Joinder of actions — Parties.

§ 717. Pleadings — The complaint.— The complaint in adverse suits should set forth generally the citizenship of the plaintiff or plaintiffs, or, if it be a corporation, its corporate character and that it was incorporated under the laws of a state or territory of the United States; also facts showing a valid location of the mining claim, and compliance with the law, by the plaintiff and his predecessors, sufficient to entitle plaintiff to present possession of the premises in question; of the survey of the ground and application for patent by the defendant; the fact that such survey conflicts with plaintiff's ground, setting forth such conflict specifically; also the fact that the plaintiff filed an adverse claim in the land office during the period of publication and within sixty days after the first publication, and the commencement of the action in court within thirty days thereafter. It should further set forth such additional facts as shall be necessary, in each particular case, to entitle the plaintiff to the area in conflict.[1]

The supreme court of California, in a nine-line opinion, announced the extreme doctrine that a complaint stating that plaintiff is the owner and in possession of the area in conflict, and that defendant claims an interest therein ad-

[1] Lee Doon v. Tesh, 68 Cal. 43, 6 Pac. Rep. 97, 7 id. 619; Keeler v. Trueman, 15 Colo. 143, 25 Pac. Rep. 310; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906; McCaig v. Bryan, 10 Colo. 309, 15 Pac. Rep. 413; Mattingly v. Lewisohn, 8 Mont. 259, 19 Pac. Rep. 310; Cronin v. Bear Creek M. Co. (Idaho), 32 Pac. Rep. 204; Anthony v. Jillson, 88 Cal. 296, 23 Pac. Rep. 419; Cadierque v. Duran, 49 Cal. 356.

verse to plaintiff, which claim is without right, and that defendant has no estate, right, title or interest in said area in conflict, states a cause of action.[1] The syllabus is somewhat stronger in statement than the opinion. But the soundness of this decision may well be questioned; and it is contrary to the other decisions of that court.[2]

§ 718. Same — The answer — The reply. — The answer, in addition to denying all the allegations in the complaint controverted by the defendant, should set forth facts sufficient to show the defendant to be entitled to recover as against the United States as well as against the plaintiff. These should consist of substantially the same allegations as are required to be made on the part of the plaintiff.[3] This is necessary for the reason, previously stated,[4] that either party in order to recover is required not only to establish a better title to the area in conflict than his adversary, but also his right to his claim as against the government; that is to say, his right to a patent. To this extent each party is practically plaintiff in the case.[5] It is in this particular that adverse suits differ from ordinary actions to determine the ownership and right of possession of real estate. And because of this distinction the plaintiff is not obliged to reply to any of the affirmative allegations in the answer necessary to establish the right of the defendant to the area in conflict, whether pleaded merely as affirmative

[1] Rough v. Simmons, 65 Cal. 227, 3 Pac. Rep. 804.

[2] Lee Doon v. Tesh, *supra;* Anthony v. Jillson, *supra;* Thompson v. Spray, 72 Cal. 534; Hall v. Arnott, 80 Cal. 348; Dutch Flat Water, etc. Co. v. Mooney, 12 Cal. 534. See also Gorman v. Alexander, 2 S. D. 557, 51 N. W. Rep. 846; Jackson v. Dines, 13 Colo. 90, 21 Pac. Rep. 918; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. Rep. 1019.

[3] Anthony v. Jillson, 83 Cal. 296, 23 Pac. Rep. 419; Cadierque v. Duran, 49 Cal. 356; Burke v. McDonald, 2 Idaho, 310, 33 Pac. Rep. 49; Cronin v. Bear Creek G. M. Co. (Idaho), 32 Pac. Rep. 204; Manning v. Strehlow, 11 Colo. 351, 18 Pac. Rep. 625.

[4] *Ante*, § 715.

[5] Jackson v. Roby, 109 U. S. 440; Rosenthall v. Ives (Idaho), 12 Pac. Rep. 904; Burke v. Bunker Hill & S. M. Co., 46 Fed. Rep. 644; Strasburger v. Beecher, 44 Fed. Rep. 213.

allegations or affirmatively in the nature of a cross-complaint or petition.[1] If either party bases his right to recover upon the statute of limitations[2] he must plead it.[3]

§ 719. Necessity of pleading citizenship.— While it is not necessary, in ordinary possessory actions involving the title to mining claims, for the parties to allege or prove citizenship, this being a question to be raised by or on behalf of the government alone, and an alien being permitted to hold until office found,[4] this rule does not apply to adverse suits. Here the government being, as it were, a party, and one of the principal issues being to determine which of the parties has the better right to a patent from it, the question of citizenship of the parties is directly involved, since patent will not issue to any one except a citizen, and it is only here that such question may properly be raised. Both parties should therefore allege and prove citizenship or declaration of intention to become such.[5]

The supreme courts of South Dakota[6] and California[7]

[1] Iba v. Central Ass'n of Wyoming, 5 Wyo. 355, 40 Pac. Rep. 527, 42 Pac. Rep. 20, 23. One of the reasons given by the court in this case for holding a reply unnecessary is that the defendant would be permitted to prove his title and right of possession, as against the plaintiff and the government under the general issue. We doubt the soundness of this ruling on this point, which is contrary to the weight of authority (see notes 3 and 5, *ante*, p. 616), but the other conclusions are based upon sound principles of law.

[2] *Ante*, § 672; R. S. U. S., § 2332.

[3] Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. Rep. 1029.

[4] *Ante*, § 261, Part V, ch. III.

[5] O'Reilly v. Campbell, 116 U. S. 418; Manuel v. Wulff, 152 U. S. 504; Doe v. Waterloo M. Co., 70 Fed. Rep. 455, 17 C. C. A. 100; Lee Doon v. Tesh, 68 Cal. 43; 6 Pac. Rep. 97, Anthony v. Jillson, 83 Cal. 296. 23 Pac. Rep. 419; McFeters v. Pierson, 15 Colo. 201, 24 Pac. Rep. 1076; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. Rep. 1019; Keeler v. Trueman, 15 Colo. 143, 25 Pac. Rep. 311; Schultz v. Allyn (Ariz.), 48 Pac. Rep. 960; Rosenthali v. Ives, 2 Idaho, 244. 12 Pac. Rep. 904; Wulff v. Manuel, 9 Mont. 279, 23 Pac. Rep. 723; Burke v. McDonald, 2 Idaho, 646. 33 Pac. Rep. 49, 50; Bohanon v. Howe, 2 Idaho, 417, 17 Pac. Rep. 483; *ante*, § 717. See McKinley Creek M. Co. v. Alaska M. Co., 183 U. S. 563.

[6] McCarthy v. Speed, 11 S. Dak. 362, 77 N. W. Rep. 590.

[7] Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. Rep. 1047.

have held to the contrary on this point. In the former case the court, without stating the reasons for its position, holds that the question of citizenship may not properly be raised in adverse suits, citing the supreme court of the United States[1] as authority. A careful examination of the opinion in the last mentioned case, however, will show that it does not so decide. In that case the claim was originally located, by a citizen and by him conveyed to an alien, who became naturalized before the judgment was rendered. After discussing these facts, the court, speaking through Mr. Justice Brewer, said:

"The incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only. Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before the judgment was rendered."[2]

In the California case the court insists strenuously throughout the opinion that the action is not an adverse suit. But it is difficult to see upon what they base this statement. The action was brought to determine the rights of the respective parties to the ground in controversy, pending the application in the land office for patent and the publication of notice thereon, and after the filing of an adverse claim. The position of the court as to the nature of the action is doubtless its reason for deciding that an allegation of citizenship is unnecessary, for it is clearly opposed to the rulings of that court in adverse suits both before and after.[3]

§ 720. **Same — Corporations.** — There is good authority to the effect that a corporation, in order to maintain an adverse suit, must, in addition to alleging its due incorporation

[1] Manuel v. Wulff, 152 U. S. 504.
[2] Manuel v. Wulff, *supra*.
[3] See California cases cited in note 5, *ante*, p. 627; Harris v. Kellogg, 117 Cal. 484, 40 Pac. Rep. 708.

under the laws of some one of the states, also allege that all its members are citizens of the United States.[1] But it can be readily seen that such a requirement as this would be very impracticable, because there is no rule of law that we are aware of, prohibiting aliens from acquiring stock in a corporation; and so a corporation composed entirely of citizens at the date of commencing the action might, by the transfer of a portion or all its stock, be composed of aliens, or aliens and citizens, at the date of trial. What would seem to be a more correct statement of the law is made by the circuit court of appeals for the ninth circuit,[2] where it is held that it is necessary for a corporation to show only its due incorporation and existence under the laws of some one of the states or territories. The Colorado court cites the supreme court of the United States[3] as authority for its position; but it will be seen by an examination of that case that while it is analogous it is not exactly in point. There the court, speaking through Justice Field, holds that a corporation, all of whose members are citizens, may locate and patent a mining claim, without deciding that a corporation, part of whose members are not citizens, may not do so.

§ 721. Facts necessary to show appropriation and ownership — Right to strengthen title after suit is filed.— Such facts should be alleged as will show a valid location in accordance with the United States and local laws, including discovery of mineral on the ground, and also the performance of the labor on the claim, by the claimant and his predecessors, required by such laws; and that the plaintiff or defendant, as the case may be, has fully performed all acts required by law to entitle him to possession and to a patent. In short, all the acts which he must prove on the trial.

The rule that a plaintiff in ejectment may not strengthen

[1] Thomas v. Chisholm, 13 Colo. 105, 21 Pac. Rep. 1019.

[2] Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

[3] McKinley v. Wheeler, 130 U. S. 630.

his title after the bringing of his suit does not apply in this class of cases. Either party may strengthen his title by an amended location notice, and may amend his pleadings to correspond to it even during the trial.[1]

§ 722. Complaint must show previously filed adverse claim.— Since, as has been stated,[2] the filing of an adverse claim in the local land office, on the part of the plaintiff, is generally an indispensable prerequisite to the maintenance of an adverse suit in court, this fact should also be alleged in the complaint.[3] But where an action is pending between the parties, involving the right to the ground, at the time of application for patent, an adverse claim may be filed and that fact pleaded in supplemental pleadings in the same suit.[4]

§ 723. Joinder of actions — Parties.— The plaintiff must join in one action as many conflicts and adverse claims, against the ground applied for, as he may rely on. But where plaintiff has acquired other conflicting areas, as shown by the adverse claims regularly filed in the land office, subseqent to the commencement of his action, he may be permitted to amend his pleadings as to such other claims.[5] It is the policy of the statute to have all conflicts, so far as possible, settled by the issuance of the patent, through the adverse proceedings therein provided for.[6] Only those parties are proper parties plaintiff who have

[1] Strepy v. Stark, 7 Colo. 614, 5 Pac. Rep. 111. See the chapter, "Amendments and Addenda," *ante*, Part VII, ch. V.

[2] *Ante*, § 681.

[3] Mattingly v. Lewisohn, 8 Mont. 259, 19 Pac. Rep. 310; Cronin v. Bear Creek M. Co., 2 Idaho, 1146, 32 Pac. Rep. 204; Marshall S. M. Co. v. Kirtley, 12 Colo. 410, 21 Pac. Rep. 492; Perego v. Dodge, 163 U. S. 158; Wight v. Du Bois, 21 Fed. Rep. 663; Eureka Cons. M. Co. v. Richmond Cons. M. Co., 4 Sawy. 312, 8 Fed. Cas. 819. Compare Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. Rep. 1047.

[4] Shoo Fly, Magnolia et al. v. Mono Lode, Copp's Min. Lands, 146, 149: Swaine v. Craven, 12 L. D. 294.

[5] Marshall S. M. Co. v. Kirtley, 12 Colo. 410, 21 Pac. Rep. 492.

[6] Lee v. Stahl, 13 Colo. 174, 22 Pac. Rep. 436.

joined in the filing of an adverse claim in the land office, and only the patent applicant or applicants are proper parties defendant.[1] A party claiming an adverse interest who has not filed an adverse claim in the land office will not be permitted to intervene in an adverse suit.[2] The common-law rule, which requires actions for the possession of real property to be brought by the heirs of a deceased person, applies in adverse suits in the absence of a statutory provision permitting the executor or administrator to maintain such action.[3]

Article C.

Trial and Judgment in Adverse Suits.

§ 724. Trial — Burden of proof.
725. Better title prevails, other things being equal.
726. Burden of proving abandonment or forfeiture.
727. Findings and judgment — Must show which if either party has complied with law, and priority.
728. Must be within scope of pleadings.
729. Judgment of dismissal for failure to prosecute with diligence.

§ 724. Trial — Burden of proof.— In this class of cases the burden is upon each party to prove title to his claim, regardless of the proof or failure thereof on the part of his adversary.[4] Neither party may rely upon the weakness of his opponent's title in order to recover, but he must depend entirely upon the strength of his own title, and must prove his right to his claim, including the area in conflict, as against his opponent, and sufficient compliance with the law to entitle him to a patent from the United States.[5] And it

[1] Mont Blanc G. M. Co. v. De Bour, 61 Cal. 364; Alger Lode, Copp's Min. Lands, 84.

[2] Mont Blanc G. M. Co. v. De Bour, *supra*.

[3] Keeler v. Truman, 15 Colo. 143, 25 Pac. Rep. 311.

[4] Gwillim v. Donnellan, 115 U. S. 45; Anthony v. Jillson, 83 Cal. 296; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. Rep. 1019; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 652; Rosenthall v. Ives, 2 Idaho, 244, 12 Pac. Rep. 904; Bay State S. M. Co. v. Brown, 10 Sawy. 243; Manning v. Strehlow, 11 Colo. 451.

[5] 21 Stat. at L. 505; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906

has been held that proof of compliance with the law, including proof of compliance with the local state laws and district rules,[1] and of course the citizenship of the parties, are indispensable.[2] For this reason, where the plaintiff fails to prove a compliance with the law and a better right to the area in conflict than that of the defendant, a judgment of nonsuit would not be proper, because the defendant would not be entitled thereon to a decree in his favor for the conflict area.[3] But plaintiff is not required to prove the filing of an adverse claim in the land office, where the allegation in his complaint, to that effect, is not denied by the answer.[4]

§ 725. Better title prevails, other things being equal.— Where each party proves such compliance with the law as would, in the absence of conflict, entitle him to a patent for his claim, the one showing the stronger title is entitled to recover in the action.[5] Of course, all other things being equal, if such a thing is possible, the older title prevails.

Until the enactment of the statute of 1881,[6] the principle of prior in time stronger in right controlled exclusively; and the parties then were obliged to prove only their own title as against each other.[7] This statute, as we have seen, requires both parties to prove a good title and compliance with the law, and when this is done of course the older title prevails. The statute reads: "That if, in any action brought

Bay State S. M. Co. v. Brown, 10 Sawy. 243; Gwillim v. Donnellan, *infra;* Anthony v. Jillson, *infra.*

[1] Becker v. Pugh, 9 Colo. 589.

[2] *Ante*, § 719.

[3] Iba v. Central Ass'n of Wyoming, 5 Wyo. 355, 40 Pac. Rep. 527–8, 42 Pac. Rep. 20.

[4] Burke v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49.

[5] Bay State S. M. Co. v. Brown, 10 Sawy. 243; Gwillim v. Donnellan, 115 U. S. 45; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; Anthony v. Jillson, 83 Cal. 296, 23 Pac. Rep. 419; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 652; 420 M. Co. v. Bullion M. Co., 8 Fed. Cas. 592.

[6] Act of March 3, 1881, 21 Stat. at L. 505; 1 Supp. R. S. U. S., p. 324.

[7] Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; 420 M. Co. v. Bullion M. Co., *supra;* Eureka M. Co. v. Richmond M. Co., *supra;* McGinnis v. Egbert, *supra*, 5 Pac. Rep. 660. See also Jamieson v. Kirk, 98 U. S. 453.

pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be so entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title."[1]

§ 726. Burden of proving abandonment or forfeiture. Forfeiture is never presumed. And in adverse suits, as in all actions involving the title to mining property, where one party relies on forfeiture or abandonment on the part of the other, the burden is upon him to establish such forfeiture or abandonment by clear and convincing proof.[2] The reason of this rule is found in the universal doctrine of presumptions, expressed in either one of two ways: duty done, and that a condition once established is presumed to continue. The proof is made as required above whenever it is shown by a preponderance of the evidence that the full amount of annual labor or improvements was not made or expended within a given year, and that advantage was duly taken of the failure before restoration by resumption of work.

§ 727. Findings and judgment — Must show which if either party has complied with the law, and priority.— The judgment in an adverse suit should be sufficient upon its face to enable the party in whose favor it is rendered to take it to the land office and have patent issued upon it, and to that end it should correctly describe the claim to which the successful party is entitled, including the area in con-

[1] See note 6, *ante*, p. 622.

[2] Hammer v. Garfield M. Co., 180 U. S. 279; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. Rep. 111, 114; Quigley v. Gillett, 101 Cal. 462, 35 Pac. Rep. 1,040; Johnson v. Young, 18 Colo. 625, 34 Pac. Rep. 173–5. On the question of abandonment and forfeiture generally, see *ante*, Part VIII, ch. III.

flict.[1] It should also show the party to be entitled to the area in conflict by virtue of a prior location of his claim and a substantial compliance with all the requirements of the federal and state statutes and local rules.[2] And all the facts constituting a valid location, such as the citizenship of the party, the discovery of minerals, etc., should be expressly found whether admitted in the pleadings or not.[3] Where the case is tried before a jury, the court should give the jury explicit instructions upon all points essential to entitle the successful party to recover in the action. A mere general verdict in favor of either party for the possessory right, as against the other, but not showing that he is entitled to recover by virtue of prior appropriation and compliance with the law, is not sufficient.[4] In the last case the reason of the rule is thus stated: "If, therefore, a judgment is sufficient which shows only, as in this case, the title to be in the successful party as against his opponent, it might frequently happen that patent would issue to a party who was an alien, or who had never discovered a vein, or in other particulars had failed to comply with the law of congress."[5]

The government being, as has been previously stated, virtually a party to the proceeding, the finding must be against it as well as against the other party;[6] and unless the court or jury is able to find in favor of one of the parties on all of these issues the action must be dismissed.[7]

[1] Becker v. Pugh, 17 Colo. 243, 29 Pac. Rep. 173; Rosenthall v. Ives, 2 Idaho, 244, 12 Pac. Rep. 904; R. S. U. S., § 2326.

[2] McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 652.

[3] Rosenthall v. Ives, *supra;* Jackson v. Roby, 109 U. S. 441; Lee Doon v. Tesh, 68 Cal. 43, 8 Pac. Rep. 651; McGinnis v. Egbert, *supra.*

[4] Manning v. Strehlow, 11 Colo. 451, 18 Pac. Rep. 625; McGinnis v. Egbert, *supra;* Burke v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49.

[5] See also Thomas v. Chisholm, 13 Colo. 105, 21 Pac. Rep. 1019-20; Craig v. Thompson, 10 Colo. 517, 16 Pac. Rep. 24; McCaig v. Bryan, 10 Colo. 309, 15 Pac. Rep. 413. But see Bennett v. Harkrader, 158 U. S. 441, 447. As to verdict in jury cases generally see *ante*, § 716.

[6] Burke v. Bunker Hill & Sullivan M. Co., 46 Fed. Rep. 644. See *ante*, § 714.

[7] Bay State S. M. Co. v. Brown, 10 Sawy. 243; notes 1, 2, 3 and 4, *ante.*

§ 728. Must be within scope of pleadings.— Manifestly the same rule applies here as in all other branches of the law — that the findings and decree must be confined within the scope of the pleadings. And it has been held that where a party seeks to include more in his decree than is embraced in his pleadings, and this after the term at which the decree was made, the decree will be void as to such supplemental matter.[1]

§ 729. Judgment of dismissal for failure to prosecute with diligence.— It is essential to the rights of the adverse claimant, under the statute, that he prosecute his suit with diligence;[2] and where the suit is commenced within the statutory time, but is not prosecuted with diligence, the defendant, upon proper notice, would be entitled to a judgment of dismissal;[3] likewise where, after judgment, a motion for a new trial is not prosecuted with diligence, the motion may be dismissed. But neither of these provisions is affected by any local statute authorizing the commencement of a new action by reason of the abatement or accident to a former one, and unless such new action is commenced within thirty days after the filing of the adverse claim in the land office it is not available as an adverse suit.[4] In a state where the statute makes the service of summons one of the requirements of the commencement of the action the summons must be actually served within the statutory time. The mere placing of it in the hands of the sheriff for service is not sufficient.[5]

But what is a diligent prosecution of the action is a question solely for the decision of the courts, and the land department is not justified in issuing a patent without affirmative evidence that the suit has been dismissed, and not

[1] Kinney v. Cons. Virginia M. Co., 14 Fed. Cas. 611.

[2] R. S. U. S., § 2326.

[3] Doon v. Teah (Cal., 1901), 63 Pac. Rep. 764.

[4] Steves v. Carson, 42 Fed. Rep. 821.

[5] Mars M. Co. v. Oro Fino M. Co., 7 S. D. 605, 65 N. W. Rep. 19.

merely because there has been long delay in prosecuting it to trial.[1] Said the court in the case just cited: "What, then, is meant by the phrase 'all proceedings shall be stayed, until the controversy is settled, or decided by a court of competent jurisdiction, or the adverse claim waived?' We can imagine several ways. . . . But all these are very far removed from the assumption by that officer that, because there have been delays in the court, plaintiff has waived his claim. It is for the court, while it has jurisdiction of the case, that is, until it is decided or dismissed, to pass upon the rights of the parties — to decide whether either party has lost his rights by laches or failure to proceed with diligence."[2]

A party has the right, at any time, to move for the dismissal of an action for want of diligent prosecution, and where such motion is overruled he is not precluded from renewing it at a later date.[3]

Article D.

Value and Effect of Judgment, and Final Entry Thereon.

§ 730. Conclusiveness of judgment as to all matters involved, including priority.
731. As to extra-lateral rights — Priorities.
732. Effect of judgment that neither party is entitled — Not *res judicata*.
733. Final entry upon the judgment.
734. Additional proof may be required by land department.
735. Summary — The doctrine of this chapter restated.

§ 730. Conclusiveness of judgment as to all matters involved, including priority. — The general rule as to the conclusiveness of final judgments upon the parties to the action, in any subsequent proceedings between the same parties or their privies involving any questions decided in it,

[1] Richmond M. Co. v. Rose, 114 U. S. 576.

[2] Id. See s. c., Rose v. Richmond M. Co., 17 Nev. 25, 27 Pac. Rep. 1105, approved in Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 693.

[3] Doon v. Tesh, 63 Pac. Rep. 764.

applies equally to adverse suits.[1] And when judgment is finally entered in an adverse suit, it is conclusive upon all the parties to it, excepting the United States, as to all questions necessarily involved and decided in it;[2] but, of course, not as to any matters raised in the pleadings which might have been decided but were not.[3] It is conclusive as to the mineral character of the land, and also as to whether a placer applicant had knowledge, at the date of application for patent, of the existence of a lode within the limits of his claim.[4] It is likewise conclusive as to the question of priority of locations.[5]

§ 731. As to extra-lateral rights — Priorities. — In any future contest between the same parties or their successors involving their extra-lateral rights, where the question of priority of location becomes material to the determination of such rights, the judgment of the court in the adverse suit upon this question is conclusive; and it makes no difference whether such judgment was entered after trial between the parties or upon the default of either.[6] The first controversy between these parties to the suit just cited was an adverse suit wherein the Last Chance filed an adverse claim in the land office to the Tyler's application for patent. Suit was brought in support of this adverse claim within the statutory period, in which suit the Tyler company duly filed its answer, but afterwards withdrew it, whereupon the Last Chance company introduced its proof, and judgment was entered in its favor for the area in conflict; the judgment reciting that the Last Chance was enti-

[1] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

[2] Last Chance M. Co. v. Tyler M. Co., *supra;* Dahl v. Raunheim, 132 U. S. 260.

[3] Last Chance M. Co. v. Tyler M. Co., *supra.*

[4] Dahl v. Raunheim, *supra*, affirming Raunheim v. Dahl, 6 Mont. 167, 9 Pac. Rep. 892; Butte & B. M. Co. v. Sloan, 16 Mont. 97, 40 Pac. Rep. 217.

[5] See next section.

[6] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 693. See also 420 M. Co. v. Bullion M. Co., 8 Fed. Cas. 592.

tled to recover by virtue of a prior location of its claim. The Tyler amended its application in the land office so as to exclude the east end of its claim, including the area brought in conflict by the adverse proceedings, and obtained patent for the remainder. The later litigation involved the rights of the parties to certain ore bodies on the dip of the vein within the legal end lines of both claims. The question of priority of location thus became a material one. The circuit court for the district of Idaho held the parties bound by the judgment in the adverse suit and entered judgment in favor of the Last Chance. On appeal to the circuit court of appeals for the ninth circuit this ruling was reversed.[1] A retrial was had, which resulted in favor of the Tyler, and the circuit court of appeals, adhering to its former ruling, affirmed this judgment,[2] whereupon a writ of error to the supreme court of the United States was sued out. This resulted in a reversal of the judgment, the supreme court holding that the ruling of the district court on the first trial was correct, and that the judgment in the adverse suit was absolutely controlling upon the parties as to all questions decided by it, including that of priority.[3]

§ 732. Effect of judgment that neither party is entitled — Not res judicata.— A judgment by the court that neither of the parties is entitled to a patent to his claim, and consequently that neither is entitled to the area in conflict, would not necessarily have the effect of causing a dismissal of the proceedings in the land office, but proceedings there may be stayed until title is perfected.[4] This upon the principle that failure to secure patent in one application is no bar to a future application upon other facts. A refusal of a patent only decides that, upon the showing made, the applicant is not entitled to patent.[5]

[1] Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284.

[2] Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 507.

[3] See note 6, *ante*, p. 627.

[4] McGinnis v. Egbert, 8 Colo. 41, 5 Pac. Rep. 652, 660.

[5] Re John Magruder, 1 L. D. 526.

§ 733. Final entry upon the judgment.—Upon the final determination of an adverse suit, the successful party is required by the statute and rule of the land department to file in the land office, without giving further notice, a certified copy of the judgment or decree, with other necessary papers and evidence, and thereupon to enter and pay for his claim, or such portion thereof as such judgment or decree shall show him rightly to possess, and thereupon patent will be issued to him accordingly in due course.[1] Where the decision shows several parties to be entitled to different portions of the claim, each party may likewise enter and pay for his portion of the claim, provided he has previously made proper application therefor.[2] The later rules of the department require either party that desires to make entry, pursuant to the judgment in an adverse suit, to file a certified copy of the judgment with other evidence showing compliance with the law. This rule is consonant with reason. The matter having been by law relegated to the courts for adjustment, the judgment of the court should be brought in to show what was decided, and is conclusive.

§ 734. Additional proof may be required by land department.—Because the judgment in an adverse suit, after the time for appeal has passed, or as finally determined in case of appeal, is favorable to either party,[3] it does not necessarily follow that the parties to it, or either of them, are entitled to a patent for their respective claims. It is still the duty of the land department to require proof that the law has been complied with in respect to matters not necessarily raised in the adverse suit, as, for instance, the certificate of five hundred dollars' improvements. And where the adverse claimant is the successful party and seeks patent for his claim, if he has not already done so, he must take all the steps in the application for patent that are required of the

[1] R. S. U. S., § 2326; L. O. Cir., July 26, 1901, §§ 85-87.

[2] Id.; Evans v. Rendell, Copp's Min. Lands, 187; Alice Placer, 4 L. D. 314; Taylor, 9 C. L. O. 92.

[3] *Ante*, § 730.

original applicant, with the exception that where his claim was officially surveyed by a United States deputy mineral surveyor prior to the time of filing his adverse claim, he will not be required to go to the expense of a resurvey.[1] To the foregoing should be added this exception: Where the entire claim has been involved in an adverse claim no notice should be required.

§ 735. Summary — The doctrine of this chapter restated. — From the foregoing outline of the law applicable to proceedings in court, trial and judgment in adverse proceedings, we are justified in extracting the following conclusions:

(1) The law confers no new jurisdiction upon any court, but simply requires that the rights of the parties be litigated in a court of competent jurisdiction. Both the authorities and the reason of the thing unite upon the proposition that the federal court and the state courts have concurrent jurisdiction over these cases where there is a diversity of citizenship, and that it will only be removed from the state court to the federal court on the grounds of diversity of citizenship, and where the value of the land will give the court jurisdiction.

The nature of the action is peculiar to the jurisdiction; in some courts in the form of ejectment, and in other courts in the form of an action to quiet title. The latter rule prevails in the federal court. The purpose of the action is to determine which party has the better title and is first in time, and likewise which, if either, is entitled to a patent. There seems to be no inherent right to a jury trial of these issues.

(2) The pleadings, of course, are framed with reference to the character of action intended to be brought, and are

[1] Perego v. Dodge, 163 U. S. 158, 168; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683; Alice Placer, 4 L. D. 314; Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95; Evans v. Rendell, Copp's Min. Lands, 187; Taylor, 9 C. L. O. 92; Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

likewise peculiar to the jurisdiction. These actions are the only ones authorized by the law wherein the citizenship of the applicant is a material issue. In these cases citizenship must be alleged and proven. The adverse claimant may and generally must unite in one action, in separate counts, however, as many adverse claims as he has against the one application. Manifestly all must relate to the same parties and not require different places of trial, and the complaint must also show a previously filed adverse claim, and that thirty days have not elapsed since its filing, and that the action is in support of the same.

(3) The burden of proof is upon the adverse claimant, but where a forfeiture is claimed upon either side, the burden is upon the one asserting it. The general rule may be stated that the older in time is the stronger in right, provided a compliance with the statute is shown.

(4) The findings and judgment of course must be within the scope of the pleadings, and the findings of fact or verdict of the jury must show which, if either, party has complied with the law and is entitled to a patent. And if neither party is entitled to a patent the action must be dismissed. A judgment of dismissal may also be entered for a failure to prosecute with diligence.

(5) The judgment is conclusive as between the parties as to all matters actually litigated or which might have been litigated under the pleadings. It is conclusive as to the date of the location as decided by the judgment.

The effect of the judgment that neither party is entitled to a patent does not restore the land to the public domain, but simply decides that upon the showing made neither party is entitled to a patent. The same result is had where the land department of its own motion refuses a patent; the matter is not thereby *res judicata*, and in either case the defect may be cured and a patent afterwards granted upon the renewed application.

Notwithstanding the judgment the land department may require proof of other facts, as the five hundred dollars' improvement or the like, before issuing the patent.

CHAPTER IV.

OF THE PATENT AND ITS VALUE.

ARTICLE A.

Conclusive as to What.

§ 737. Of the definition of, and different kinds of patents, and of the authority of the statute, and its observance in their issuance.
738. Of the extent of right or title conveyed by a patent affecting mineral lands — Different patents and their important features — Limitations and reservations.
739. General effect and value of patent — Confirms existing title — Non-mineral patent carries minerals.
740. Conclusiveness generally.
741. Presumption of regularity in land office proceedings.
742. Same — As to character of land — Citizenship.
743. Relation of acts included in patent — Relates to location — Rights as between patented and unpatented ground.
744. In case of variance between calls of patent and monuments on the ground, the latter controls.

§ 737. Of the definition of, and different kinds of patents, and of the authority of the statute, and its observance in their issuance.— The patent for a mining claim is the conveyance whereby the government parts with the legal title to the land, with the appurtenant rights, in accordance with the statute. It is not within the scope of this work to make a detailed examination as to the law of land patents; that should be the subject of a separate work. The patent is but the creature of the statute, and those who issue it are but the servants of the same law; whence it follows, as we shall have occasion to particularize in the proper places, the patent in the scope of both grant and reservation can only follow the law; a mere grant of the land, with specific reference to the purpose of the grant, and the law under which it is made, will be just as effectual to convey all the statute

authorizes, and make all the reservations it requires, as it would be if those were copied at length therein. In other words, while the better rule undoubtedly is to insert in a patent all the essential rights granted, as authorized by the law, and all the rights reserved to others, or to the United States and its grantees, as required by the same law, for the obvious reason that only those provisions on either side, which the law authorizes, can be effectively inserted, the clerical omission to insert clauses in the patent manifestly required by law, or the improvident insertion of clauses not authorized or required, cannot affect the patent.[1] For example, when the law says that the owner of the apex of a vein, properly located, has the right to follow the same on its downward course into the land adjoining, which land shall be sold subject to that right, it becomes an exception or reservation out of that land, provided the adjoining land is sold after the mineral land; and it is of no moment whether the limitation is inserted in such grant or not. Since the officers of the government could not by the misapplication of words abridge or deny the right given by the law, it is conceived as a necessary corollary that the entire omission of a reservation which the law makes, would not affect the right to assert it.[2] The patent is rather the evidence of the confirmation of a right granted by the law than the abstract granting of the right itself. So each patent is construed as of its own date;[3] and while it is said nothing not granted in express terms passes by the patent,[4] yet, if the sections of

[1] Sullivan v. Iron Silver M. Co., 143 U. S. 431, 36 L. ed. 214; Iron Silver M. Co. v. Reynolds, 124 U. S. 374, 31 L. ed. 466; Davis v. Weibbold, 139 U. S. 507, 35 L. ed. 238; Amador Medean G. M. Co. v. South Spring Hill G. M. Co., 36 Fed. Rep. 668, and cases. See also *post*, §§ 754–61; *ante*, § 666; English v. Railway Co., 23 L. D. 343; Edwin F. Frost, 24 id. 228.

[2] Ledbetter v. Borland (Ala.), 29 So. Rep. 579, and cases cited; Davis v Weibbold, *supra;* Talbott v. King, 6 Mont. 76, 9 Pac. Rep. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. Rep. 570.

[3] Pacific Coast M. Co. v. Spargo, 16 Fed. Rep. 348.

[4] Barden v. N. P. R. R. Co., 154 U. S. 288.

the law are mentioned, all they embrace and authorize will certainly pass; but, of course, all reservations for the benefit of the public or of the United States will be liberally construed.[1] There are some cases, which, by according too much importance to the language of the patent itself, seem at first to warrant conclusions somewhat different from those we have drawn, but it is believed that when the underlying principles are accurately understood and given full force, it will be found that the best reasoned cases look to the law under which a patent is issued, rather than to the patent itself, for guidance.

While, as we will show when we treat of the doctrine of the apex and extra-lateral right, the right to penetrate adjoining ground must be reserved *out of the adjoining* ground patent, or the right is not conferred, and it is said that the vein in order to have such rights must have been located at the date of the non-mineral or adjoining patent,[2] yet we think these cases have certainly gone farther than the doctrine of the Barden case, and that the reservation in the Spargo case was intended to be and was sufficient to reserve the dip right to all veins under the land.

§ 738. Of the extent of right or title conveyed by a patent affecting mineral land — Different patents and their important features — Limitations and reservations. — The different patents which affect mines and mineral lands may be enumerated as follows:

(a) Patent under law of 1866.

(b) Patent lode claim law of 1872.

(c) Placer patent under law of 1870 and amendments.

(d) Patent for lode in placer.

(e) Patent for town site and exceptions, including patent for lode in town site.

We will consider them in their order.

[1] Barden v. N. P. R. R. Co., 154 U. S. 288.

[2] Pacific Coast M. Co. v. Spargo, 16 Fed. Rep. 348; Amador Medean M. Co. v. South Spring Hill M. Co., 36 Fed. Rep. 668.

(*a*) *Patent under the law of 1866.*— We have elsewhere considered these patents at some length,[1] which will naturally curtail the scope of the present inquiry. We have seen that in those patents the lode was the principal thing located and patented, and the surface ground a mere incident.[2] These patents were for so much of the lode, together with the surface ground claimed by the applicant and allowed by the laws of the district.[3] The extra-lateral or dip right, conferred by the law and confirmed by the patent, are carefully considered in the sections mentioned in the note. They are, in a general sense, the same as those under the present law, and were recognized in the district rules, as we have seen. While different-shaped surface ground was granted under these patents,[4] since the universal rule of the districts required that the claim be staked, the conclusion is beyond question that the right of pursuit of the vein upon the strike is limited to the surface ground as patented, and the claim as staked and described in the patent.[5] The right to other veins apexing in the ground patented under the law of 1866 does not result from the patent itself, but from the law of 1872,[6] and are granted as a right conferred by the statute, excepted from the right of possession of the surface, and coterminous, as are all veins, as to the right to pursue the strike thereof, with the surface boundaries of the claim as patented.

(b) *Patent for lode claims under the law of 1872.*—We have elsewhere considered the extra-lateral right given by the law and confirmed by these patents, and have also re-

[1] *Post*, §§ 774–76.

[2] *Post*, § 767; Walrath v. Champion M. Co., 63 Fed. Rep. 552, 72 Fed. Rep. 978, 19 C. C. A. 328, 171 U. S. 293, 43 L. ed. 170; Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253; Wolfley v. Lebanon M. Co., 4 Colo. 112.

[3] Walrath v. Champion M. Co., 63 Fed. Rep. 552.

[4] Walrath v. Champion M. Co., *supra;* Cons. Wyoming Co. v. Champion M. Co., 63 Fed. Rep. 540; *post*, § 774.

[5] Flagstaff v. Tarbet, *supra.*

[6] R. S. U. S., § 2322; Walrath v. Champion M. Co., *supra;* Cons. Wyoming M. Co. v. Champion M. Co., *supra;* Wilhelm v. Silvester, 101 Cal. 358, 35 Pac. Rep. 997.

viewed the cases and the law on the subject of reservations. It is our purpose now to mention the essential features of the grant itself and its reservations. What we said in the last preceding section, as to the patent being the creature of the law, must be borne in mind. It cannot be broader than the law, and will generally be interpreted as conveying all the law authorizes, especially if the law under which it is issued is mentioned. The usual granting clause is as follows (*mutatis mutandis*): "Giving and granting, etc., the said mining premises hereinbefore described as lot No. 297, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of nine hundred and forty-two (942) linear feet of the said Empire vein, lode ledge, or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: Provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits. And provided further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another: To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said," etc.

[1] *Post*, § 756.

The other grants, restrictions, limitations and reservations are usually as follows:

"*First.* That the grant hereby made is restricted to the land hereinbefore described as Lot No. (297), with (nine hundred and forty-two) linear feet of the Empire, vein, lode, ledge, or deposit for the length aforesaid throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

"*Second.* That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

"*Third.* That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

"*Fourth.* That, in the absence of necessary legislation by congress, the legislature of (Utah) may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development."

It will thus be seen that the patent generally follows the statute very closely. Indeed, it is essential that it do so. The patent is only a confirmation of existing rights.[1]

[1] Forbes v. Gracey, 94 U. S. 762; Manuel v. Wulff, 152 U. S. 505; Hughes v. Devlin, 23 Cal. 502; Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, Fed. Cas. No. 4,548; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636.

(c) *Placer patent under law of 1870 and amendments.*— The placer patent was authorized by the law of 1870, substantially continued in force as sections 2329 and 2330, with section 2331 added in 1872, of the Revised Statutes of the United States, together with the later amendments specifically authorizing the location and patenting of stone and other similar non-metallic minerals. We are at present more concerned with the form of patent usually employed to convey a gold placer claim. The quantity of land which may be acquired under a placer patent, and the proceedings to acquire it, are discussed in the previous sections of this work. After the recital of the predicatory facts, the granting clause and the description, which are similar in all mineral patents, the patent usually contains the following special provisions:

First. The grant is restrained to exterior limits and to any vein or lode of gold, silver, cinnabar, tin, lead or copper not known to exist, and which may have been discovered subsequent to the date of application.

Second. Should any vein or lode of quartz or other rock in place containing gold, silver, cinnabar, lead, tin, copper or other valuable deposit be claimed or known to exist within the area described at the date of application, the same is expressly excepted and excluded from the patent.[1]

Third. The premises conveyed by the patent may be entered by the proprietor of any vein or lode (apexing in a proper lode claim) for the purpose of extracting the ore, should the same, or any part, be found to penetrate or intersect, pass through, or dip into, the mining ground granted by the patent.[2]

Fourth. The grant is made subject to vested or accrued water rights.

Fifth. The same reservation as to right of way as in a lode patent.

[1] Sullivan v. Iron Silver M. Co., 143 U. S. 431, 36 L. ed. 214.

[2] The matter in parentheses is not, but should be, inserted in the patent.— AUTHOR.

It will be observed that as to the placer claim itself lines are drawn vertically, and that any lode not known to exist at the date of application is also granted; and the question arises, whether as to any such lode, notwithstanding the previous restriction of the patentee's rights to surface boundaries, extra-lateral rights are given to the placer owner. The precise question has not, so far as we are able to ascertain, been decided; but, since a known lode is excepted out of the placer, all of which is fully described elsewhere in this work, and such lode may, like a lode in a town-site entry, be patented with all the appurtenant rights given by the law, including the extra-lateral right, it must necessarily follow that this is a right which the law attaches to the lode, no matter who may have it, and consequently the placer patentee acquires it, and the vertical boundaries are only applied to the placer right. The logic of this proposition finds support in the well-settled rule of law often enunciated by the supreme court of the United States, that where the existence of a vein or lode is not known at the time of application for the placer patent, such instrument will convey all valuable minerals and other deposits within its boundaries.[1]

(d) *Patent for lode in placer.*— The discussion of this question in the last preceding sub-head and its treatment elsewhere in this work[2] renders a further examination at this time wholly superfluous.

Generally speaking, the rights acquired must be the same as those under the ordinary lode patent.

(e) *Patent for town site and exceptions.*— The discussion in the last preceding subheads, in addition to that elsewhere in this work, reduces the space necessarily devoted to it here.[3] In the sections mentioned in the note we discussed

[1] Sullivan v. Iron Silver M. Co. (per Justice Field), 143 U. S. 431, 36 L. ed. 214-217; Id., 109 U. S. 550, 27 L. ed. 1028; Iron Silver M. Co. v. Reynolds, 124 U. S. 374, 31 L. ed. 466; Reynolds v. Iron Silver M. Co., 116 U. S. 687, 29 L. ed. 774.

[2] *Ante*, §§ 667-669. See also South Star Lode, 20 L. D. 204.

[3] See Town-site Reservations, *ante*, §§ 210, 214.

the statutes under which town sites are authorized to be patented, and have attempted to show that the more positive provisions of the statute of 1891[1] were evidently inserted to make more positive the policy of congress not to part with the mineral lands, or any mineral vein of rock in place containing the enumerated metals, through the channel of the town-site laws.

These reservations themselves are sometimes made by reference to the sections of the statute under which the patent is issued, as, e. g., the Eureka (Utah) Town-site Patent. But the better and more usual plan is to insert in the patent substantially the language of the statute, in the following form: "No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws of congress."[2]

We believe that the intention of the law is to absolutely except from the operation of the town-site patent all lodes or veins of minerals, whether known or unknown. The reason for this statement is that congress does not dispose of mineral lands this way. In the Deffeback-Hawke case and the Davis-Weibbold case the court virtually decides this, but reads the word "known" into the law and the decision, which, read in the light of the Barden case, is unauthorized. Besides, the word "known" becomes a boomerang, and comes back to plague the court in a later case.[3] It is of no consequence now that Dower *v.* Richards was, upon this point, wrongly decided. Congress emphasized its meaning by section 16 of the act of 1891, already quoted, and the department has for a long time recognized, and now affirms the law to be, that all veins or lodes of rock in

[1] Act to repeal timber culture laws and for other purposes, § 16, 1 Supp. R. S. U. S., p. 945; Hulings v. Ward Town Site, 29 L. D. 21; Brady's Mortgagee v. Harris, id. 426.

[2] Pacific Slope Lode v. Butte Town Site, 26 L. D. 518; Gregory Lode Claim, 26 id. 144. See also Mauser Lode Claim, 27 id. 326.

[3] Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 36 L. ed. 201.

place, containing any of the enumerated metals, are absolutely reserved and may be separately patented just as the lode in a placer may be patented.[1] Of course it does not apply, nor attempt to apply, to placer ground, because a placer and a town site cannot occupy the same ground at the same time.

§ 739. General effect and value of patent — Confirms existing title — Non-mineral patent carries minerals.— The patent neither enlarges nor restricts the estate already possessed in any other manner than to add security.[2] Neither does it enlarge, abridge nor deny the extra-lateral rights of an adjoining proprietor or the patentee.[3] It operates to convey all the estate of the United States in the surface, and everything connected with it,[4] including all veins of mineral beneath it, not otherwise granted, and all minerals in any manner connected with it, except veins apexing outside and dipping into it;[5] and when based upon a location lawfully made, it carries with it all such rights, subject only to such reservations as are therein expressed.[6] The rule that all minerals beneath the surface pass by virtue of the patent applies also to those in land embraced in an agricultural or mill-site entry, where the patent is not secured by fraud, and the minerals are not known to exist at the date of its issue.[7]

The supreme court of Montana, in a recent case, announced a rule which would have the effect of giving to the patentee of a mining claim a broader estate than he possessed before he secured his patent. In construing section

[1] Gregory Lode Claim, 26 L. D. 144. See Pacific Slope Lode v. Butte Town Site, 26 L. D. 518. See also *ante*, §§ 667–70.

[2] Cheeseman v. Hart, 42 Fed. Rep. 98, 103. See also New York Hill Co. v. Rocky Bar Co., 6 L. D. 318.

[3] Cheeseman v. Hart, *supra*.

[4] Moore v. Smaw, 17 Cal. 119.

[5] Moore v. Smaw, *supra;* Kahn v. Old Telegraph M. Co., 2 Utah, 174.

[6] Blake v. Butte M. Co., 2 Utah, 54; Tucker v. Masser, 113 U. S. 208.

[7] Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 647, 16 Fed. Rep. 848; Deffeback v. Hawke, 115 U. S. 405.

494 of the Code of Civil Procedure of 1895, which provides that "no action for the recovery of mining claims . . . shall be maintained unless it appears that the plaintiff or his assigns was seized or possessed of such mining claim within one year before the commencement of such action," the court held that this provision did not apply to patented placer mining claims, but only to such as are not patented; and that patented mining claims are controlled by the same limitations as ordinary real estate, which in that state is ten years.[1]

§ 740. Conclusiveness generally.— A patent for mining lands, being the culmination of the proceedings to obtain title in fee to the land, vests in the patentee a muniment of title upon which he may rely for peace and security in the enjoyment of his estate therein.[2] It is, when valid on its face and not issued through fraud or in opposition to law, conclusive against the government[3] and against all claiming under junior title.[4] It is also conclusive evidence, except when directly attacked for fraud, that all steps antecedent to its issue have been regularly and legally taken,[5] as well as of all matters decided by and within the jurisdiction of the land department,[6] including the character of the land,[7] the citizenship and qualifications to receive patent

[1] Horst v. Shea, 23 Mont. 390, 59 Pac. Rep. 864.

[2] St. Louis Sm. & Ref. Co. v. Kemp, 104 U. S. 636; St. Louis Sm. & Ref. Co. v. Ray, 104 U. S. 657; Steele v. St. Louis Sm. & Ref. Co., 106 U. S. 447; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; Chambers v. Jones, 17 Mont. 156, 42 Pac. Rep. 758; Biddle Boggs v. Merced M. Co., 14 Cal. 279; Kahn v. Old Telegraph M. Co., 2 Utah, 174.

[3] St. Louis Sm. & Ref. Co. v. Kemp, *supra;* Johnson v. Towsley, 13 Wall. 72; Moore v. Smaw, 17 Cal. 199; McGarrihan v. New Idria M. Co., 49 Cal. 331. See also Wofley v. Lebanon M. Co., 4 Colo. 112.

[4] *Ante*, note 2.

[5] United States v. Iron Silver M. Co., 128 U. S. 673; United States v. Marshall Silver M. Co., 129 U. S. 579; Davis v. Weibbold, 139 U. S. 507; Kahn v. Old Telegraph M. Co., *supra;* Poire v. Wells, 6 Colo. 406.

[6] See *post*, next section, note 8.

[7] See *post*, § 742.

on the part of the patentee,[1] and all matters which were or might have been made the subject of an adverse claim or protest.[2]

§ 741. Presumption of regularity in land office proceedings.— A patent valid on its face, until it is annulled or set aside, carries with it the presumption that all matters within the jurisdiction of the land department, and all questions of fact which might rightfully have come before it, have been settled and adjudicated in favor of the patentee.[3] The scope of this rule is, of course, limited to such matters only as are within the jurisdiction of the department; and as will be discussed hereafter,[4] where the department has exceeded its province, the patent may be attacked either collaterally or directly.[5] The rule, however, includes all matters which should or might have been litigated under an adverse claim; and the rights of any and all adverse claimants, if any such may have existed, are finally barred and concluded by the issuance of patent.[6]

§ 742. Same — As to character of land—Citizenship.— The land department has exclusive jurisdiction to determine the character of the land,[7] and the issuance of patent is con-

[1] See *post*, § 742.

[2] See *post*, next section, note 6.

[3] 420 M. Co. v. Bullion M. Co., 8 Fed. Cas. 592; Iron Silver M. Co. v. Cheeseman, 8 Fed. Rep. 300; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; Kahn v. Old Telegraph M. Co., 2 Utah, 174; United States v. Marshall Silver M. Co., 129 U. S. 579; United States v. Iron Silver M. Co., 128 U. S. 673; Hamilton v. Southern Nev. M. Co., 33 Fed. Rep. 562. See *ante*, § 665, notes 6 and 7, p. 575.

[4] See *post*, § 746.

[5] Davis v. Weibbold, 139 U. S. 507; United States v. Miner, 114 U. S. 233; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636; Poire v. Wells, 6 Colo. 406; Cullacott v. Cash M. Co., 8 Colo. 179, 6 Pac. Rep. 211.

[6] Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819; Gwillim v. Donnellan, 115 U. S. 45; Dahl v. Raunheim, 132 U. S. 260; Kannaugh v. Quartette M. Co., 16 Colo. 341, 27 Pac. Rep. 245; Seymour v. Fisher, 16 Colo. 197, 27 Pac. Rep. 240.

[7] St. Louis Sm. & Ref. Co. v. Kemp, 104 U. S. 636; Steele v. St. Louis Sm. & Ref. Co., 106 U. S. 447; Dahl v. Raunheim, 132 U. S. 260; Butte & Boston M. Co. v. Sloan, 16 Mont. 97, 40 Pac. Rep. 217; Meyendorf v. Frohner, 3 Mont. 282;

clusive of all matters pertaining to the character of the land embraced therein.[1] The question of the citizenship of the patentee is also conclusively determined by the issuance of patent, and the patent is not open to collateral attack on this ground.[2] Nor is it open to collateral attack upon any ground which requires the introduction or examination of evidence to substantiate. Only upon grounds which render it void on its face can it be attacked collaterally.

§ 743. Relation of acts included in patent — Relates to location — Rights as between patented and unpatented ground.— While the issuance of patent is conclusive of all matters which might have been made the subject of an adverse claim,[3] there are questions arising in certain cases on which the patent furnishes no evidence as to the priority of the respective claims involved. In such cases it is essential to show the date of the inauguration of the right upon which the patent is based.[4] And the rule has been established that the title conveyed by a mining patent relates back to the location, which is its foundation, as the inception of the right,[5] and cuts off all intervening rights and surface con-

Parley's Park M. Co. v. Kerr, 130 U. S. 266. As to jurisdiction of land department generally, see *ante*, Part IX, ch. I; Durango Coal & Iron Co. v. Evans (C. C. A.), 80 Fed. Rep. 425, and cases cited, p. 429.

[1] St. Louis Sm. & Ref. Co. v. Kemp, *infra;* Steele v. St. Louis Sm. & Ref. Co., 106 U. S. 447; Gale v. Best, 78 Cal. 235, 20 Pac. Rep. 550; Irvine v. Tarbot, 105 Cal. 237, 38 Pac. Rep. 896; Dreyfus v. Badger, 108 Cal. 65, 41 Pac. Rep. 279; Johnston v. Morris, 72 Fed. Rep. 890.

[2] Justice M. Co. v. Lee, 21 Colo. 260, 40 Pac. Rep. 444; Billings v. Aspen Smelting Co., 52 Fed. Rep. 250, 3 C. C. A. 69.

[3] *Ante*, §§ 741 and 742; 420 M. Co. v. Bullion M. Co., 8 Fed. Cas. 592; Talbott v. King, 6 Mont. 76, 9 Pac. Rep. 434; Mitchell v. Cline, 84 Cal. 409, 24 Pac. Rep. 164.

[4] St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Kahn v. Old Telegraph M. Co., 2 Utah, 174.

[5] Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634; St. Louis S. & R. Co. v. Kemp, *supra;* Deffeback v. Hawke, 115 U. S. 392; Silver Bow M. Co. v. Clark, 5 Mont. 378, 5 Pac. Rep. 570; Talbott v. King, *supra;* Deno v. Griffin, 20 Nev. 249, 20 Pac. Rep. 308; Kahn v. Old Telegraph M. Co., *supra.*

flicts not raised and decided adversely to its holder prior to its issuance. But it is only when controversies arise affecting certain conflicting sub-surface rights between neighboring proprietors, and in conflicts between overlapping patents, that the question of priority of location becomes material;[1] and in such proceedings the patent relates to the date of location.[2]

But in a recent case, where there were two filings upon the same piece of coal land by different parties, one of which was canceled, and patent issued upon the other, the parties had each mined coal from different parts of the premises, pending a decision of their contest. After its determination the successful party sought to have this rule applied so as to date his rights from the filing of his declaratory statement, in order to compel an accounting from the other for the coal mined, and the circuit court of appeals for the eighth circuit held that his rights dated from the issuance of the receiver's receipt.[3] This, however, was upon a coal entry, where no previous location is necessary; and while we think the right should relate to the date of filing the declaratory statement, yet, even if it is properly decided, it is no authority for a similar rule as to either lode or placer claims, as they give just as complete and perfect rights without a patent, by possession and work, as if patented.[4]

§ 744. In case of variance between calls of patent and monuments on the ground, the latter control.— The field-notes of the surveyor are presumed to be made with reference to the monuments on the ground, and, when so made, of course they should correspond; and when the patent is

[1] Iron Silver M. Co. v. Campbell, 17 Colo. 367, 29 Pac. Rep. 513; Eureka M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819; Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 82, 16 Pac. Rep. 513, 515; Kahn v. Old Telegraph M. Co., 2 Utah, 174; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478.

[2] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 583.

[3] Evans v. Durango C. & I. Co. (C. C. A.), 80 Fed. Rep. 433.

[4] Champion M. Co. v. Cons. Wyoming M. Co., *supra*.

issued it should describe the land with reference to the field-notes of the surveyor on file. It sometimes happens, however, that the calls in the patent do not agree with the monuments on the ground, and whenever there is a discrepancy of this nature the monuments on the ground must prevail.[1] Of course this rule has reference to monuments which have always remained on the ground since first placed there; and where it appears that they have not remained in place, or where there is as much doubt as to where the monuments were first located as there is whether the course is correct, it has no application.[2]

Article B.

Direct and Collateral Attack and Incidents Thereof.

§ 746. Generally free from collateral attack.
747. Conflicting patents within the rule — Town-site and other patents not conveying minerals.
748. Patent — How and by whom set aside.
749. Manner of proceeding to have patent annulled or set aside for fraud — Must apply to commissioner.
750. Nature of the action — Time.
751. Burden of proof.
752. When patentee trustee.
753. Summary.

§ 746. Generally free from collateral attack.— As a general rule, the patent is not open to collateral attack in ordinary actions between individuals.[3] In such actions it is absolutely unassailable so far as it involves the character, quality and shape of the land,[4] the citizenship and other

[1] Los Angeles Farming & Milling Co. v. Thompson, 117 Cal. 594, 49 Pac. Rep. 714, 717; Adair v. White, 85 Cal. 313, 24 Pac. Rep. 663, 664.

[2] Thallman v. Thomas, 102 Fed. Rep. 935.

[3] Meyendorf v. Frohner, 3 Mont. 282; Butte City Smoke-House Lode Cases, 6 Mont. 359, 12 Pac. Rep. 858; Jeffords v. Hine (Ariz.), 11 Pac. Rep. 851.

[4] Waterloo M. Co. v. Doe, 56 Fed. Rep. 655; Carson City G. & S. M. Co. v. North Star M. Co., 83 Fed. Rep. 658, 28 C. C. A. 333; Peabody G. M. Co. v. Gold Hill G. M. Co., 97 Fed. Rep. 657.

qualifications of the patentee and his predecessors and grantors,[1] which are matters open to attack only by the government in a proper proceeding,[2] and upon the grounds of any supposed defects or infirmities not appearing on its face.[3] Where, however, it is shown to be void on its face, from statements or recitals appearing therein,[4] or where, from similar statements or recitals, it appears that the land department had no authority or jurisdiction to dispose of the land described,[5] or where the land department has inserted unauthorized conditions or reservations,[6] or where for any other reason it fails, unaided by extrinsic evidence, it may be impeached collaterally in any proceeding.

§ 747. Conflicting patents within the rule — Town-site and other patents not conveying minerals.— Wherever a mining patent conflicts with another patent, whether it be the overlapping of two mining claims, by reason of erroneous or fraudulent survey,[7] a lode claim overlapping a

[1] Billings v. Aspen M. & S. Co., 51 Fed. Rep. 338; on rehearing, 52 Fed. Rep. 250; Justice M. Co. v. Lee, 21 Colo. 260, 40 Pac. Rep. 444; New Dunderburg M. Co. v. Old, 79 Fed. Rep. 598; Golden Reward M. Co. v. Buxton, 79 Fed. Rep. 868.

[2] Meyendorf v. Frohner, 3 Mont. 282; Jeffords v. Hine, 11 Pac. Rep. 851.

[3] *Ante*, § 741, note 3, p. 643; French v. Fyan, 93 U. S. 169; St. Louis Sm. & Ref. Co. v. Kemp, 104 U. S. 636; Wright v. Rosebury, 121 U. S. 488; United States v. Schurz, 102 U. S. 378; Johnson v. Towsley, 13 Wall. 76; Montana Central Ry. Co. v. Migeon, 68 Fed. Rep. 811.

[4] St. Louis Sm. & Ref. Co. v. Kemp, *supra;* Morton v. Nebraska, 21 Wall. 660; Kahn v. Old Telegraph M. Co., 2 Utah, 174; Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 16 Pac. Rep. 514; Cullacott v. Cash G. & S. M. Co., 8 Colo. 179, 6 Pac. Rep. 211; Ledbetter v. Borland (Ala.), 29 S. Rep. 579.

[5] Deffeback v. Hawke, 115 U. S. 392; Davis v. Weibbold, 139 U. S. 509; Doolan v. Carr, 125 U. S. 618; Lakin v. Dolly and Lakin v. Roberts, 58 Fed. Rep. 333; Parley's Park S. M. Co. v. Kerr, 130 U. S. 261; Hardin v. Jordan, 140 U. S. 371; Ledbetter v. Borland, *supra.*

[6] *Ante*, note 5; Butte City Smoke-House Lode Cases, 6 Mont. 359; King v. Thomas, 6 Mont. 409, 12 Pac. Rep. 865.

[7] McGarrahan v. New Idria M. Co., 49 Cal. 331; Biddle Boggs v. Merced M. Co., 14 Cal. 380; James B. Belford, 2 C. L. O. 178; Lindl. Mines, sec. 782.

placer,[1] a conflict between an agricultural[2] or town-site[3] and a mining claim, or between the land described in a state patent and one from the United States,[4] these, and any similar conflicts, being matters which directly involve the rights of the parties to their property as described in their respective patents, may be raised collaterally at any time.[5] It is a settled rule of law that a town-site patent conveys no title to the minerals,[6] and therefore, wherever there is a conflict between the holders under mineral and town-site patents, the question may be raised by the mineral patentee at any time, and his patent, though junior in date, will prevail, so far as the right to the minerals is concerned.[7] The officers of the land department have the right, and it is their duty, to insert in patents all the conditions, reservations and exceptions authorized by law in the particular case,[8] but wherever they exceed this authority, as previously stated, their action is void and open to collateral attack.[9]

[1] Iron Silver M. Co. v. Sullivan, 16 Fed. Rep. 829; s. c., 109 U. S. 550; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; s. c., 116 U. S. 687; Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

[2] Bentley v. Gibbons, Com'r to Salt Lake City Office, Feb. 26, 1896 Amador Medean G. M. Co. v. South Spring Hill G. M. Co., 86 Fed. Rep. 668; United States v. Culver, 52 Fed. Rep. 81; Wedekind v. Craig, 56 Cal. 642; Kansas City M. & M. Co. v. Clay (Ariz.), 29 Pac. Rep. 9; Virginia Lode, 7 L. D. 459; Washington v. McBride, 18 L. D. 192.

[3] Butte City Smoke-house Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; King v. Thomas, 6 Mont. 409, 12 Pac. Rep. 865; Steel v. St. Louis Sm. & Ref. Co., 106 U. S. 447; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 9 Pac. Rep. 570; Sparks v. Pierce, 115 U. S. 408; Deffeback v. Hawke, 115 U. S. 405.

[4] Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634.

[5] St. Louis Sm. & Ref. Co. v. Kemp, 104 U. S. 636; Steel v. St. Louis Sm. & Ref. Co., *supra;* Evans v. Durango L. & C. Co., 80 Fed. Rep. 433; s. c., id. 425; Butte City Smoke-house Lode Cases, *supra;* Kahn v. Old Telegraph M. Co., 2 Utah, 174.

[6] See notes 3 and 5, *ante.*

[7] Deffeback v. Hawke, *supra;* Butte City Smoke-house Lode Cases, *supra;* Davis v. Weibbold, 139 U. S. 507; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478.

[8] Broder v. Natoma Water & M. Co., 101 U. S. 274.

[9] *Ante,* § 746, note 6, p. 647, *ante,* this section, note 5.

§ 748. **Patent — How and by whom set aside.** — The United States, the same as any other grantor, may set aside the patent for any act of fraud on the part of the grantee — patentee — afterward discovered and known by, or presumed to be within the knowledge of, such patentee, at the time the patent was issued;[1] and, of course, upon the ground of actual misrepresentation and consequent fraud thereby.[2] But it is indispensable to all such suits that the land, and the beneficial ownership thereof, be substantially, if not actually, in the possession of the patentee at the time the suit is brought to set aside the patent.[3] The fraud that will justify setting aside the patent is any such legal fraud as will warrant the canceling of a deed or grant of an individual;[4] as, where mineral land has been entered as agricultural land, or upon false representations.[5] So a patent will be declared void where lands known at the time to be valuable for minerals are patented as agricultural lands, although there is no fraudulent concealment of their mineral character.[6] The false representations being material, the application to set aside the patent cannot be in too great detail.[7]

[1] United States v. Iron Silver M. Co., 128 U. S. 673; Mullan v. United States, 118 U. S. 271; United States v. Miner, 114 U. S. 233; Meader v. Norton, 11 Wall. 442; United States v. Trinidad Coal & C. Co., 137 U. S. 161; United States v. Pratt C. & C. Co., 18 Fed. Rep. 708; Boggs v. Merced M. Co., 14 Cal. 279; Moffat v. United States, 112 U. S. 24.

[2] United States v. Iron Silver M. Co., *supra;* Mullan v. United States, *supra;* Moffat v. United States, *supra;* United States v. Miner, *supra;* Meader v. Norton, *supra.*

[3] Colorado C. & Iron Co. v. United States, 123 U. S. 307.

[4] United States v. Miner, *supra;* Boggs v. Merced M. Co., *supra.*

[5] United States v. Iron Silver M. Co., *supra;* Mullan v. United States, *supra;* United States v. Trinidad C. & C. Co., *supra;* United States v. Pratt Coal & C. Co., *supra;* Boggs v. Merced M. Co., *supra.*

[6] United States v. Culver, 52 Fed. Rep. 81; Stoddard v. Chambers, 2 How. 284; Minter v. Crommelin, 18 How. 87; Sherman v. Buick, 93 U. S. 216.

[7] Colorado C. & I. Co. v. United States, *supra.*

§ 749. Manner of proceeding to have patent annulled or set aside for fraud — Must apply to commissioner.— A party seeking to have a patent set aside should first make application to the land department, of which application the patentee is entitled to notice.[1] Such application must be made to the commissioner of the general land office and must show the facts which the applicant relies upon to set aside a patent, likewise the proofs. Before taking action a report is obtained from the local office, and, if a hearing is ordered upon the showing, it is upon the concurring judgment of both the local and the general land office;[2] and the facts taken altogether must make out a *prima facie* case before a suit will be ordered.[3] The better opinion is that the government ought not to seek to set aside its patents except upon clear and convincing proof of fraud or mistake;[4] nor at all where there has been a full hearing of the facts and the petition for hearing to set aside the patent presents no new facts.[5] But it is proper to institute proceedings to cancel a patent issued through inadvertence or mistake pending an appeal on a contest[6] or other proceedings before the department.[7] And while it is said, as a general rule, the United States must have some interest in the result in order to justify interference,[8] the duty to protect the title granted by it constitutes a sufficient interest.[9] So where there has been an erroneous survey, and patent for the wrong land issued, suit may be brought to cancel the patent with the view of correcting the mistake.[10] When all the facts are ascertained, and are by the land depart-

[1] Little Nell Lode, 16 L. D. 104.

[2] Butte & Boston M. Co., 21 L. D. 125.

[3] Jas. D. Negus, 11 L. D. 82.

[4] Butte & Boston M. Co., *supra*.

[5] Thos. Starr et al., 2 L. D. 759.

[6] Lead City Town Site v. Little Nell Lode, 17 L. D. 291.

[7] N. P. R. R. Co. v. Gosnell, 29 L. D. 58.

[8] Mullan v. United States, 118 U. S. 271; United States v. Miner, 114 id. 233.

[9] Mountain Maid Lode, 5 L. D. 28. See also Smoke-House Lode, 4 L. D. 555.

[10] United States v. Rumsey, 22 L. D. 101.

ment deemed sufficient, they are reported to the attorney-general with the request that he cause the proper suit to be brought to set aside the patent.

§ 750. Nature of the action—Time.—A bill in chancery, brought by the United States to vacate and set aside the patent, is an original action setting up the circumstances of fraud or misrepresentation which entitle the grantor to vacate the patent,[1] and is not to be treated as a writ of error, or as a petition for rehearing in chancery.[2] The general rule is that a patent can be so vacated only by the United States in a direct action.[3] In such actions the United States stands on the same plane as an individual.[4] Formerly an action could be brought by the United States to set aside the patent at any time, but since the passage of the act of March 3, 1891,[5] it must be brought within six years from the date of issuance of the patent, and a failure to bring it within that time bars the right.[6] But the rule that he who seeks equity must do equity has been held not to apply to the United States in these actions, and the government is not bound to refund the money before bringing a suit to vacate a patent.[7]

§ 751. Burden of proof.—As has been before stated in this chapter,[8] the presumption always is that the officers of the government did their duty, and that the patent was

[1] Boggs v. Merced M. Co., 14 Cal. 279; Meyendorf v. Frohner, 3 Mont. 282.

[2] United States v. Marshall S. M. Co., 129 U. S. 579.

[3] Boggs v. Merced M. Co., *supra;* Meyendorf v. Frohner, *supra.* But see *post*, § 752; New Dunderburg M. Co. v. Old, 79 Fed. Rep. 598, 25 C. C. A. 116; Peabody G. M. Co. v. Gold Hill G. M. Co., 106 Fed. Rep. 241.

[4] United States v. McKnight, 98 U. S. 179; United States v. Smith, 94 U. S. 214, 217; United States v. Flint, 4 Sawy. 44, 25 Fed. Cas. 1107; United States v. Beebee, 17 Fed. Rep. 30; United States v. Prat C. & C. Co., 18 Fed. Rep. 708; Colorado C. & I. Co. v. United States, 123 U. S. 307; United States v. Trinidad C. & C. Co., 137 U. S. 161.

[5] 26 Stat. at L. 1093.

[6] *Ante*, note 4; Peabody G. M. Co. v. Gold Hill G. M. Co., *supra.*

[7] United States v. Trinidad C. & C. Co., *supra.*

[8] *Ante*, § 741.

correctly issued. The burden of proof is therefore on the party seeking to set aside the patent to overcome this presumption by clear and convincing proof.[1] Mere irregularities in the issuance of the patent are not sufficient to justify its cancellation.[2] The proofs must of course be sufficient to show that there has been fraud or imposition on the part of the patentee, and that such fraud or misrepresentation was upon material questions without which the patent would not have issued. Or it must show that there was mistake of fact either as to identity or some similarly important matter.[3]

§ 752. **When patentee trustee.**— The rule is established that where one party wrongfully obtains patent to land to which another party is entitled, whether he acts in good faith or otherwise, he will be charged as constructive trustee for such other party.[4] This is the rule in a case where one co-owner attempts by illegal or fraudulent means to oust his co-tenant and secure title in himself.[5] And the same rule has been held to apply to a case where an applicant for patent, after publication of his notice, had permitted his rights to lapse, and at a later date, after a valid location of the same ground by another party, fraudulently or clandestinely secured patent to the ground under his former application.[6] In that case it was held that the subsequent

[1] United States v. Iron Silver M. Co., 128 U. S. 673; Colorado C. & I. Co. v. United States, 123 U. S. 307; Butte & Boston M. Co., 21 L. D. 125.

[2] Colorado Coal & I. Co. v. United States, *supra;* United States v. King, 83 Fed. Rep. 188; Robert Hawke, 5 L. D. 131.

[3] See *ante*, § 749, and cases *ante*, § 666.

[4] Lakin v. Sierra Buttes G. M. Co., 11 Sawy. 231, 238, 25 Fed. Rep. 337; South End M. Co. v. Tinney, 23 Nev. 221, 85 Pac. Rep. 89, 91; Wilson v. Castro, 31 Cal. 220; Hardy v. Harbin, 4 Sawy. 549, 11 Fed. Cas. 504; Rector v. Gibbon, 101 U. S. 276, 291; Sanford v. Sanford, 19 Oreg. 1, 18 Pac. Rep. 602.

[5] Turner v. Sawyer, 150 U. S. 578; Hunt v. Patchin, 35 Fed. Rep. 816; Seymour v. Fisher, 16 Colo. 188, 27 Pac. Rep. 240; Butte Hardware Co. v. Schwab, 18 Mont. 351, 34 Pac. Rep. 24. See *ante*, § 659.

[6] Hardy v. Harbin, *supra*. See also Richmond M. Co. v. Rose, 114

locator was in such privity with the United States that he could contest the validity of the patent and assert his right to the ground.[1]

§ 753. **Summary.**—From the foregoing sections it appears that the patent, when regularly issued, and in the absence of fraud on the part of the applicant, is a muniment of title, upon which the holder may rely for peace and security. It is conclusive, generally, as to the character of the land, and as to the date and regularity of the location and the correctness of surface description and all other matters of fact, including the citizenship of the applicant, necessarily passed upon by the department; and that these principles flow, among other reasons, from the presumption of regularity which attach to proceedings in the land office.

The patent is generally free from collateral attack unless void on its face, as being issued without authority, or for land not authorized to be sold.

A patent, however, may be set aside by direct attack on any ground of fraud or misrepresentation, which would be sufficient to annul the deed of an individual. The action for this purpose must be commenced within the usual period of limitations, and, except when involving an infirmity, concerning which an assignee ought, and for that reason is presumed to take notice, must be brought against the original patentee, and while he is still owner of the title. But this rule again has no application where the assignment or transfer of the patent title is colorable, collusive or fraudulent. The burden of proof in all cases is upon the government.

Wherever there has been any concealment as to the true title and the patent taken by one not a true owner of the title, the patent is not for that reason void nor voidable, but equity will convert the patentee into a trustee for the true owner.

U. S. 576, affirming s. c., 17 Nev. 25, 27 Pac. Rep. 1105; Power v. Sla (Mont.), 61 Pac. Rep. 468.

[1] South End M. Co. v. Tinney, 22 Nev. 221.

CHAPTER V.

OF RESERVATIONS EXPRESSED IN PATENTS.

§ 755. Preliminary and review.
756. Miscellaneous reservations in patents originating in custom.
757. The constitutional aspect of the question.
758. Water rights and other easements — Local rules.
759. Limitations in patents of lode claims as to veins discovered in a tunnel.
760. Right of adjoining proprietor to follow the vein on its downward course.
761. Summary.

§ 755. Preliminary and review.— We have already noticed at considerable length that there are certain lands upon which a mining location may not be made, and among them are lands upon which the government had authoritatively impressed a reservation.[1] These reservations, of course, are either executive by the president as commander-in-chief of the army and navy, or they are legislative, so to speak; that is to say, they are made by or under the statute. In the one case they may be temporary, and in the other they must be permanent. Both take effect upon the exercise of the law over them.

It is equally manifest that the reservations themselves proceed from the law and the authority given thereby; whence it follows that the officers issuing patents are but the servants of the law, and, as we have seen,[2] are restricted and controlled in their operations, and as to the language they shall use in the patent, by the letter and the terms of the law itself. No other exceptions, terms or conditions can be inserted in the patent than those authorized by the law,

[1] See *ante*, Part IV, ch. VI, §§ 210-212. [2] *Ante*, § 666.

and, if so inserted, the patent is, as to that part, absolutely void.[1]

§ 756. Miscellaneous reservations in patents originating in custom.— By statute certain easements and rights of way made necessary by customs of mining districts are required to be inserted in the patent. This is a recognition of such customs and the consequent easement, and is usually expressed as follows: "That in the absence of necessary legislation by congress, the legislature of (the particular state) may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development."

It will be noticed that this language is scarcely as broad as the statute, which reads as follows: "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and these conditions shall be fully expressed in the patents."[2]

Notwithstanding some courts affect to believe that it is beyond the power of congress to delegate any power to a state legislature, such courts are met by this suggestion: What is to prevent congress from itself exercising, or delegating to another the exercise of, a particular power over the subject of which it has plenary control? Besides, it is not necessary to call it a delegation of power. We think there can be no question that this power is well reserved and can be exercised upon the lines granted. These pro-

[1] Cowell v. Lammers, 10 Sawy. 254, 21 Fed. Rep. 200; Deffebach v. Hawke, 115 U. S. 402; Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 36 Fed. Rep. 668, 670; Butte City Smoke-house Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858; Doe v. Waterloo M. Co., 54 Fed. Rep. 935; *post*, §§ 866, 867; Ledbetter v. Borland (Ala., 1901), 29 S. Rep. 579, and cases.

[2] 14 Stat. at L., p. 252; R. S. U. S., § 2338.

visions in patents are therefore of limitations upon the grant, and the interests thus reserved are carved out of it.[1] Of course they are not self-executing reservations; they simply recognize as valid such easements as local law may regularly impose or authorize.[2]

§ 757. The constitutional aspect of the question.— In what we have said in the last preceding section we are not unmindful of the limitations placed upon congress in respect of matters of purely state concern, and for that reason congress may not interfere with the subjects over which the right of eminent domain may be exercised within a sovereign state. In the view we take of it, congress has not done that, but has simply said that no matter what other property shall be liable to easements, and to the exercise of eminent domain, within the state, this property shall be sold by the proprietor who owns it under the law, subject to such special easements, denominated as rights of way for ditches, for drainage and for other purposes, as are sanctioned and made necessary by a local custom and usage, and that these limitations shall be and are impressed upon these grants.

§ 758. Water rights and other easements — Local rules. It would seem that the same statute and the principles involved therein are broad enough and sufficiently complete in their terms to impress a similar easement for water ditches or the like, proceeding from the basis of miners' rules and the local customs of the district. It is true the patent only in terms recognizes existing water rights and the rights to ditches and reservoirs. But there can be no

[1] See Jennison v. Kirk, 98 U. S. 453; Broder v. Natoma Water Co., 101 U. S. 274; Jacob v. Day, 111 U. S. 571, 44 Pac. Rep. 243; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54; Rockwell v. Graham, 9 Colo. 86, 10 Pac. Rep. 284; Murray v. Butte City, 7 Mont. 61, 14 Pac. Rep. 656; Barnes v. Sabron, 10 Nev. 217; Hobart v. Ford, 6 id. 77.

[2] Jennison v. Kirk, *supra*.

doubt that that was intended to cover and include all reasonable rights of way in connection therewith. The provision usually inserted is the following: "That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of the court."[1]

There can he no doubt that this would include ditches for drainage as well as those necessary to convey water for hydraulic mining. This statute recognized existing conditions and protected existing rights. It not only looked to the future but provided for the past. Whence it follows that the existence of the right, whether it grew up with the beginning of mining on the Pacific coast, or was inaugurated subsequent to the passage of the law, is equally protected.[2]

§ 759. Limitations in patents of lode claims as to veins discovered in a tunnel.— The discussion in a previous section[3] as to the position of the supreme court upon the effect and extent of a tunnel reservation makes some further observations necessary at this time respecting a vein apexing in patented ground and not known to exist at the date of the tunnel location. If, as the supreme court say, no rights can be lost by a failure to adverse the application for patent with the inchoate tunnel right, it must necessarily follow that the patentee, notwithstanding the language of his grant, secures no title to any vein discovered in such tunnel within three thousand feet from the mouth or "face" thereof, and not known to exist at the date of the location of the tunnel, provided only that he has prosecuted work

[1] 14 Stat. at L., p. 352; R. S. U. S., §§ 2338, 2339.

[2] Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119; Hobart v. Ford, 6 Nev. 77; Barnes v. Sabron, 10 Nev. 217. See also Broder v. Natoma Water Co., 101 U. S. 274; Van Sickle v. Haines, 7 Nev. 249.

[3] *Ante*, § 297 *et seq.*

with reasonable diligence. If, however, the patent is granted before the tunnel is located, of course its rights have fully attached, and are relieved of, or rather not subject to, any such condition. The far-reaching effect of this decision[1] cannot be overestimated. Either it will have to be modified or the patent is no longer an evidence of title upon which the holder may rest for peace and security.

§ 760. Right of adjoining proprietor to follow the vein on its downward course.— By far the most sweeping reservation inserted in all the patents to mining claims, and likewise all other patents issued at the present time in the vicinity of mineral land, whether they be agricultural or town-site patents, is the one which protects the miner in his right to follow the vein on its downward course or dip. The full consideration of this question is postponed to the next succeeding part of this work, but it is proper to say in passing that too much stress has been laid in the protection of this right, or rather in attempts to defeat it, upon the common-law principle that he who owns the surface owns all beneath it. That principle of the law still exists and no attempt will be made to ignore it, but this statute carves an exception or reservation out of the patent and bestows it upon the owner of the apex; and it also reserves the same right out of the estate of the person owning the apex with respect to any other adjoining or neighboring proprietor, so that it takes nothing without bestowing an equivalent in return. It is not altogether in derogation of the common law, it is rather in the nature of a remedial statute, partaking at the same time of some of the elements of a declaratory one. It is the statute upon the subject and should be taken by its four corners and construed.

§ 761. Summary.— Briefly summarized, then, the reservations which may be expressed in a patent are those which the law authorizes and no more. As to the easements au-

[1] Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108.

thorized by the statute, the purpose is manifest that wherever the statutes are silent, that is to say, the statutes of the United States, the local legislature may provide rules for working mines, involving the subject of easements, drainage and other necessary means to their complete development. This is evidently not intended to interfere in any way with either the police regulations of the state or its exercise of the law of eminent domain, but simply advocates the regulation of these matters by the states or territories, and that the property sold by the United States in this manner shall not be relieved of these particular burdens if the state shall see fit to place them upon it.

PART XI.

OF SUB-SURFACE AND EXTRA-LATERAL RIGHTS.

CHAPTER I.

GENERAL AND PRELIMINARY — NATURE OF ESTATE — AND HEREIN OF DEFINITIONS.

ARTICLE A.

Preliminary Observations — Whence the Law.

§ 765. Preliminary and introductory — Statutory severance.
766. Of the extent and place of the common-law presumption — True dip and strike, application of, to end and side-line veins.
767. The policy of the law.
768. The origin of the law.
769. Same subject — Right recognized on the continent — Natural justice of the dip right.
770. The theory of the statute — Veins nearly vertical — Vein formation.

§ 765. Preliminary and introductory — Statutory severance.— In this part of our inquiry we shall treat of that branch of the mining law which, at first blush, seems to enact a radical departure from the principles of the common law; that is to say, the right to follow the vein on its dip, or its downward course, beyond and outside of the vertical boundaries of the claim, according to the words used by the statute.

The distinction between this feature of the law and its other branches, when all are carefully considered together, is not so marked as the first impression leads one to imagine. This is rather a statutory severance of the mineral estate from the estate which the owner of adjoining ground other-

wise possesses upon common-law principles, after the vein or lode departs from the vertical planes of the location in which its apex is found, into such adjoining ground. The similarity of the principles governing this estate which the law carves out of that belonging to the adjoining proprietor and gives to the proprietor owning the apex, and the estate which one proprietor conveys to another by deed or lease, as we shall have occasion to examine when we reach that branch of our inquiry,[1] in its general nature and features, is quite apparent. In both the same incidental rights, duties and obligations between the mineral claimant and surface proprietor exist in all their details, including (which is sufficient for the purpose of the present inquiry) the incidental right of ingress and egress other than barely following the vein; likewise that of surface support.[2]

§ 766. Of the extent and place of the common-law presumption — True dip and strike, application of to end and side-line veins. — In England at the common law, and in other countries where the common law or the modified civil law prevailed, all minerals, except royal metals, contained or found within and under the surface of the earth, were deemed part of the soil and belonged to the owner of the soil. In this country prior to the federal statutes of 1866 and 1872 this doctrine prevailed. It still prevails in a much more ample form than it did at the common law in all the states, except the public mineral land states of the west, as outlined in the early part of this work. In these states it prevails, except as modified by the statute in one direction and enlarged in another direction; the modification being in the carving out of the estate located or patented the right in a neighboring proprietor, with lines properly laid and marked, to pursue his vein on its downward course beneath the ground in question. The enlarged right is that of thus pursuing the vein on its dip or downward course into neighboring ground between the planes

[1] See Severance, *post*, Part XII, ch. IV. [2] See *post*, Part XII, ch. V.

of the end lines of the claim, or those judicially or by the law declared to be such, and produced and extended in their own direction so as to include the portion of the vein in question.

Reasoning upon the line that if there is a vein of ore beneath a certain surface there is no person, except the surface proprietor, authorized by the law to dispute with the person attempting to mine it, the courts have decided that the only solution of the difficulty thus presented is by the application of the common-law rule, by the well-known terms of which the owner of the surface is presumed to own all beneath. And, following this principle, the courts have said that by virtue of ownership of the surface such owner is justified in saying to all intruders, "Hands off until you show a better right,"[1] and that the owner of the surface is *prima facie* owner of all beneath.[2] Within certain lines this rule must be applied; but, as we shall attempt to reason out further on,[3] we think some courts have gone too far in asserting the dogmatic rule that the owner of the surface is always *prima facie* presumed to own all beneath, and even one following a vein of ore on its true dip must show a clear right when he proceeds beyond its own lines.

We think one following his vein, on its true dip, let us say, is presumed to be right in all doubtful cases. The courts, however, with a greater show of power than of reason, have decided the matter exactly the other way, and now say, indeed it is firmly settled, that the owner of the surface is, under the common-law rule, presumed to own all beneath it. Let us illustrate our position by the diagram on page 663, taking the diagram in the Del Monte case for an illustration.

Instead of the apex of the vein being well defined, sup-

[1] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540.

[2] Leadville M. Co. v. Fitzgerald, 4 M. R. 380, 15 Fed. Cas. 98, 101; Cons. Wyoming G. M. Co. v. Champion M. Co., *supra*. See also Parrot S. & C. Co. v. Heinze (Mont.), 64 Pac. Rep. 326.

[3] *Post*, § 793.

pose it is in the beds of the limestone and irregular — a frequent occurrence. Suppose the Last Chance claim to be the older and the ore in dispute to be under the New York at a point marked by the word "New," and that they be-

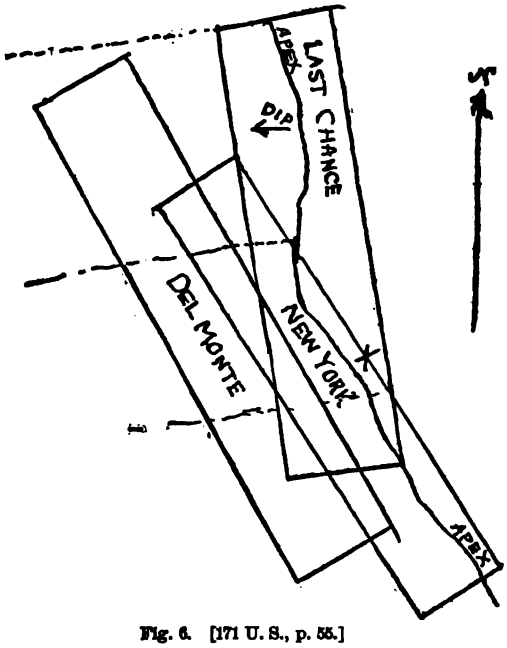

Fig. 6. [171 U. S., p. 55.]

long to different owners. Being the older claim it would own all the ore between its northerly end line and another line drawn parallel therewith at the point where the extreme part of the apex entered the New York ground. The true dip, we must remember, is at right angles with the average strike.

Suppose there was a well-founded dispute so that it became a question of fact as to whether the vein crossed the New York side line at the point marked on the diagram or at the point "X," or some intermediate point. In such case we think the presumption should be with the apex owner for all purposes, and the burden upon the New York. It would be with the Last Chance owner mining in good

faith, so as to protect him against damages for removing the ore beyond the value of the ore, less actual cost of breaking, hoisting and marketing. The application of such a rule would of course furnish an exception to the one usually applied by the courts, but we think such an exception at least should be recognized.

In another section [1] we attempt to limit the application to the common-law rule to doubtful cases only. We believe that is the logic of the law when accurately considered. But that such is not now the law, according to the great weight of decisions, we are frank to admit; perhaps the present rule is too firmly rooted to be overturned, and that the most the courts will yield is the recognition of exceptions. The rule as it now stands, it will be observed, is more rigid, and by it the surface owner is presumed to own all beneath his surface.

§ 767. The policy of the law.— Of the policy of this statute we have nothing to say. We must take the statute as we find it. Much could be said on both sides of the question. While litigation often grows out of it that, with vertical bounding planes, could be avoided, there is a principle of innate justice pervading this law, inasmuch as it bestows upon the discoverer of a vein at the surface the right to pursue that vein to an indefinite depth, provided only that he shall so lay his boundaries upon the surface as to render his claimed rights capable of ascertainment. This principle of law, as we shall see in the next section, once pervaded the mining jurisprudence of Germany. It is said by a writer qualified to know, that it was surrendered and obliterated because of the endless litigation it entailed.[2] Be that as it may, in the enlightened and progressive spirit in an age when the brainiest men of the world were marking out their rights in a new country in their own way, with the previous

[1] *Post*, § 798.

[2] Dr. R. W. Raymond, Mineral Resources, 1869, p. 195; Klosterman, Treatise Prussian Mining Laws, Berlin, 1870; *ante*, § 81.

knowledge of Germany, good or bad, staring them in the face, and with the customs of the High Peak of Derbyshire furnishing them a precedent, with the necessities of the times as a final and controlling factor, the miners of the Pacific coast engrafted this principle upon the district rules that controlled their mining operations in California prior to this statute, and it would have seemed like a denial of justice to them had the federal statute been framed in any other form.

§ 768. The origin of the law.— It is impossible to demonstrate at this time, with absolute certainty, whether the miners of the Pacific coast were prompted by the experience of the miners of Derbyshire, the knowledge of Germans and the customs existing there for many centuries, although fallen into disuse, or whether it was innate Yankee ingenuity, guided by the necessities of the times and the principle of natural justice that the discoverer of a mine should enjoy it to its ultimate depths, which prompted the insertion into the mining rules and regulations of nearly ever district of provisions in the form of statutory customs, that is to say, enactments of the mining district, by which the discoverer and owner of a vein was entitled to so much of it on its strike, with all its "dips, spurs, and angles, offshoots, depths, widths, variations, and all mineral and other valuables therein contained."[1] But it is sufficient for the purpose of this work that such a custom obtained, and the right was universally recognized.

§ 769. Same subject — Right recognized on the continent — Natural justice of the dip right.— It is quite apparent that the necessity of some such right or custom has been recognized as an abstract proposition, whether it ever had the sanction of law or not, in all cases where there was an actual surface exposure and discovery of a mineral-bearing vein descending into the earth at such a slight angle from the horizontal as to carry it beyond the boundaries of

[1] J. Ross Browne's Mineral Resources, 1867, p. 247; Lindl. Mines, § 566.

the ordinary mining claim in such a manner as to give to the discoverer but little more of the vein than he had of the surface ground; in other words, to give him but a leaf out of a book, as it were, and instead of permitting him to reap the reward of his discovery, it was open to the next comer who might purchase or obtain a claim in the direction of the dip, thus working an injustice upon the discoverer. A similar right was recognized in the High Peak customs of Derbyshire, which gave to the miner acquiring a rake vein an increased extent measured in accordance with the inclination of the dip.[1] It was recognized under the Mexican and Spanish law, which gave to the discoverer greater pertenencias according to the inclination of the vein to the horizon — the flatter the vein the greater the pertenencias.[2] But neither of these rules, it is true, recognized the undefined right to pursue the vein endlessly to the depth on its downward course as it exists under our statute, but simply enlarged the common-law right. It was observed on the continent and noticed by many law writers, and De Fooz thus recognized the right in a quotation from another writer: "Mines," says Jousselyn, "can be worked with advantage only when they are treated *en masse*, or in sections of a certain extent, without reference to surface boundaries."[3] And again: "It is, says Heron de Villefosse, a kind of property of which we deprive ourselves when we are unwilling or unable to use it in its *ensemble*."[4]

§ 770. The theory of the statute — Veins nearly vertical — Vein formation.— We noted in the chapter wherein statutory tunnel claims were considered, that it was manifest, from the general nature of the statute and the extensiveness of the reservation acquired by a tunnel claimant

[1] Bainbridge, Mines, p. 42; Yale, Min. Claims & Water Rights, p. 421; McSwinney, Mines, p. 509.

[2] Gamboa's Com., chs. 9, 10; Rockwell, Mines, pp. 223-231.

[3] Traite des Servitudes d' Utilite Publique; De Fooz, Mines, p. 12.

[4] De Fooz, Mines, *supra*.

properly pursuing the law, that the author of the mining law had in mind the idea (seldom realized) that mineral veins were always fissures nearly vertical. The force of that observation is of peculiar significance here. From the entire law the conclusion is irresistible that congress had in mind single distinct fissures standing almost vertical, and generally thought to be distinct and separate from all neighboring veins, that is, independent of any theory or notion of zones, lodes or broad veins. Moreover, that these veins were susceptible of being easily traced upon the surface.[1] At that date, too, geologists had variant ideas as to vein formation, and all different from those obtaining at the present time. While it was generally thought then that most veins were of plutonic origin, and that rule obtains now, the difference is this: that the idea largely prevailing then[2] was that veins were formed by the metals coming up from the molten core of the earth in a molten form, and becoming disseminated by means of subsequent circulating surface waters, causing substitutions and replacements to occur; while the generally accepted theory now is that the hot waters holding the minerals in solution have been forced through fissures, the separated strata and bedding planes and along the lines of fault planes, under heavy pressures from very great depths; that these waters have eaten their way into the surrounding walls or strata, feeding upon matter capable of partial solution, until the identity of bounding planes, whether fissures or strata, is often obliterated.

Following the lines of least resistance, too, the dynamic force which made the opening may create a fissure straight and clean for a long distance, cutting the bedding planes and strata regardless of seams or breaks, and, approaching the surface, will often break out into the beds followed by the mineral solutions; whence is often found veins and ore deposits partly in fissures and partly in the bedding planes of the adjoining rock. The presence of ore in the strata and

[1] Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284, 4 C. C. A. 329.

[2] Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887.

beds of adjoining rock is accountable in some cases by the erosion of the beds and their more soluble strata by the solutions in their ascent toward the surface. This eating and dissolving process also accounts for the existence of great broad zones in limestone regions where the solutions have dissolved and replaced large quantities of the limestone of a particular kind, generally magnesian or dolomite, thus making a vein which we have already had occasion to consider at some length, where the boundaries of the vein can only be determined by the line of demarkation indicating the contact of the mineralized matter with the absolutely barren country. If the author of the law had been fully informed as to the fact of vein formation as now understood, it is very doubtful whether the law would have been enacted in its present form, and more probable that vertical bounding planes would have been the requirement of the law.

Article B.

Of the Rights Arising under the Laws of 1866, and of Parallelism of End Lines.

§ 773. Preliminary observations — Nomenclature of the statute — General construction.
774. Of the patent granted thereunder.
775. Of the parallelism of end lines under this statute.
776. End lines were implied — Parallelism essential.
777. Conclusions — Lode was the essential thing located, but parallelism of end lines was necessary to the adequate enjoyment of the right.

§ 773. Preliminary observations—Nomenclature of the statute — General construction.— In the statute of 1866 the right under consideration was expressed in this language, which was spoken in connection with the rights granted by the patent, namely: "Whenever any person, or association of persons, claim a vein or lode of quartz, . . . and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful

for said claimant . . . to . . . receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." [1] Bearing in mind the provision which was general to all codes of district rules, adverted to in the last preceding article,[2] it will be observed that this statute was written in the nomenclature of the mining camp, and consequently expressed the idea pervading the law which the miners had ascertained to be essential for their guidance.

§ 774. Of the patent granted thereunder.— The patents granted under this law were, many of them, more indefinite in the point of expressing the nature and extent of the grant than were the most vague and uncertain of the miners' rules. Mr. Lindley speaks of some of them as defining a certain piece of surface ground with the lode granted marked by a line running off in a certain direction from such surface ground, and supposed to mark the strike of the lode. At all events it marked the direction authorized to be followed by the patent. In some of the states and territories, however, the practice became fixed to mark out the rights granted by the patent by definite boundaries covering the supposed course of the strike of the vein in some cases, such as the Flagstaff.[3] In others, such as the Virginia,[4] there was an area of surface ground described wider than the portion supposed to cover the strike of the vein, and having no other reasonable connection therewith than a convenience, or supposed convenience, for mining operations, with a strip of surface ground connecting therewith and supposed to run on the strike of the vein.

It is manifest that while the practice which obtained in Utah with reference to the character and dimensions of

[1] Act of July 26, 1866, 14 Stat. at L., ch. 262, p. 251, § 2, repealed by Act of May 10, 1872.

[2] *Ante*, § 768.

[3] Fig. 5, *ante*, § 481, p. 454.

[4] Id.

these patents, as shown in the figure mentioned above, was more rational than the vague idea mentioned by Mr. Lindley, it is equally apparent that owing to the crudities of the statute it was utterly impossible for the officers of the land department to define the extent of the grant, with its limits and conditions, with anything like reasonable certainty; they were compelled to go beyond the terms of the statute in some instances or fall far short of its terms in others.

§ 775. Of the parallelism of end lines under this statute.— The courts have said, at least one court, speaking through the great Justice Field, that parallelism of end lines was not essential under this statute.[1] It is true that in express terms no such requirement was made, but it is self-evident, when the rights of the miners, as they themselves understood them, are carefully and thoughtfully considered, and due heed given to the relative rights of adjoining proprietors in the same vein — that is to say, those adjoining on the strike — that the idea and thought that the dividing line between them, which marked their rights each toward the other, must have been strong and controlling to the effect that such lines, of right and necessity, must be placed squarely across the dip and produced in their own direction through the dip, and, as thus produced, to define the dividing line between such adjoining proprietors.

There is abundant evidence supporting this thought in the diagram of claims in the Figure 5 mentioned in the last preceding section, where all the claims (and all were located and patented under the law of 1866) are marked with parallel end lines, and in the diagram of the case it self wherein Judge Field announced the decision above referred to.[2]

[1] Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 9 M. R. 578, 8 Fed. Cas., p. 819, No. 4,548.

[2] 8 Fed. Cas., p. 820.

The figure below is taken from the report of the case in Federal Cases,[1] and it will be observed that the compromise line ("C," "X," "W") was projected along the end line of the Richmond and Champion and the Lookout and Marga-

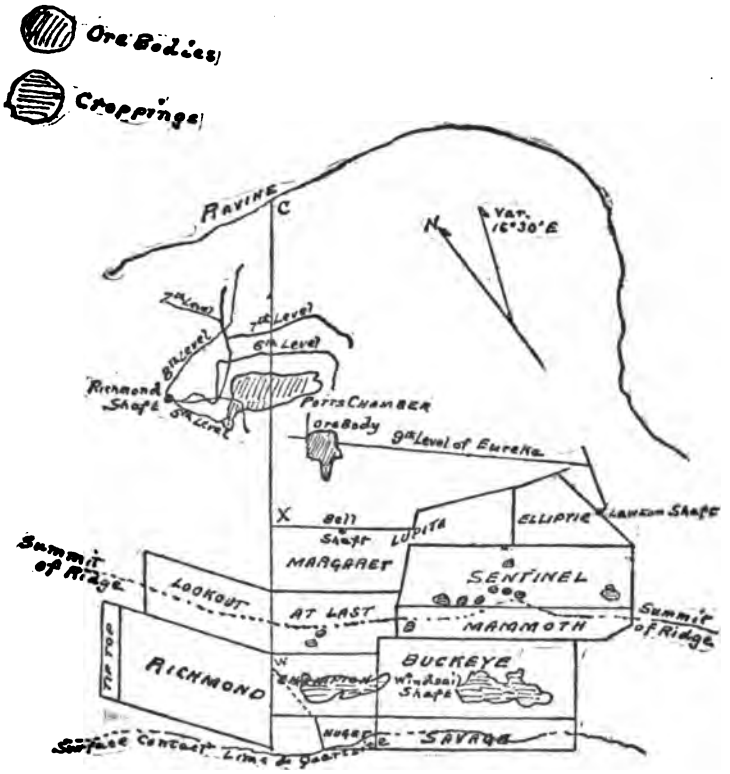

Fig. 7.

ret. It will also be observed that the Richmond and Lookout had parallel lines, as did also the Champion, Buckeye and Savage, but the other claims had not, although there was a general system adopted whereby parallelism of end lines seemed to be the controlling feature.

It is probable that this question is fast fading from the pages of mining litigation; but it is Banquo-like and will

[1] 8 Fed. Cas. 820.

down at no man's bidding. Some titles are held by these patents; more may yet be acquired. It is therefore possible that questions may arise at any time, and so it is essential that we reach a correct conclusion as to the law; and, notwithstanding the logic of the great case above cited,[1] it is believed that the spirit which pervaded the mining jurisprudence, the common law of mining,[2] before the enactment of the statute, warrants the conclusion that in all such litigation parallelism of end lines should be rigidly adhered to and enforced. It is true that in the enforcement of this principle the courts will necessarily encounter obstacles which are difficult of solution; but, if we relegate its enforcement and solution to the same principles which control the courts in all other cases where, by reason of the character of the lines themselves, extra-lateral rights are somewhat abridged,[3] we shall reduce the difficulty to a minimum, if not entirely wipe it out. To do this, parallelism of end lines must be recognized and applied to locations under this law, and these lines should be drawn substantially across and at right angles with the general or average strike of the vein.

§ 776. End lines were implied — Parallelism essential. Not to repeat too much, but to pursue the line of thought adverted to in the last preceding section, we find ample warrant for the conclusion that end lines were clearly implied in the law of 1866. In the case so copiously cited in the last preceding section this rule is expressly recognized in the following words of Justice Field: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein

[1] Eureka M. Co. v. Richmond M. Co., 8 Fed. Cas. 819, followed in Horswell v. Ruiz, 67 Cal. 111, 7 Pac. Rep. 197. See also syllabus V and that portion of the opinion to which it refers, Eureka Case, *supra*.

[2] King v. Edwards, 1 Mont. 235.

[3] *Post*, this Part, ch. II, art. C.

for that distance on the course of the ledge, and to any depth within that distance. . . . The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein, with its dips, angles and variations, to any depth, although it may enter land adjoining — that is, land lying beyond the area included within his surface lines. It is land lying on the side of his claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. . . . Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of claimant's line of location, will carve out, so to speak, a section of the ledge or lode within which he is permitted to work, and out of which he cannot pass."[1]

Parallelism of end lines is here plainly suggested as the pervading idea. It is true the process suggested for ascertaining them will not always produce that result. But if the general course of the vein is taken as a base line and a right angle drawn from it, it will produce that result, and do no more violence to the statute than the mode suggested by Justice Field. As previously suggested, parallelism of end lines defines the miners' rights accurately; any other course does not.

§ 777. Conclusions — Lode was the essential thing located, but parallelism of end lines was necessary to the adequate enjoyment of the right. — It thus appears that under the law of 1866 the lode was really the essential thing located, and it was generally all that was marked on the ground, and the line of the lode the only thing attempted

[1] Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas., pp. 816, 827.

to be marked, the ends not being marked at all. Inaccuracy in marking the lode was the pervading rule, and correct marking seemed only to result from accident.[1]

We have attempted to demonstrate that under this law end lines drawn parallel to each other and crosswise of the strike and through the dip of the lode were essentially implied.[2] The purpose of this is not difficult of solution. It was the result of the experience of the miner restricting the limit of sub-surface ownership to the extent that he owned the apex of the vein. Under that law, and under the miners' rules existing prior thereto, dips, spurs and angles were claimed and allowed; the exercise of the right thus accorded could only be justly made by an observance of this principle and this rule.[3]

Article C.

Of the Enlargement, Perpetuation or Restriction of Apex Rights under the Law of 1872.

§ 781. Of the estates in mining claims under the statutes — Extra-lateral rights.
782. Meaning of the term "extra-lateral rights."
783. Controlling value of surface lines.
784. Parallelism of end lines made essential by the statute of 1872.
785. Distinctions between such estate and the common law.
786. And first, the common-law estates.
787. Additional estate created by statute.
788. Limitations upon this grant.
789. No right to prospect in neighbor's ground.
790. Identity and not continuity the test of the right.
791. Guiding rules for interpreting the statute — Common-law rule ignored.

[1] Walrath v. Champion M. Co., 63 Fed. Rep. 552; McCornick v. Varnes, 2 Utah, 355, 360; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 323, Fed. Cas. No. 4,548; Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304.

[2] *Ante*, § 776.

[3] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540; Walrath v. Champion M. Co., 63 Fed. Rep. 552; affirmed, s. c., 171 U. S. 293; Wilhelm v. Sylvester, 101 Cal. 358, 35 Pac. Rep. 997; McCornick v. Varnes, 2 Utah, 355.

§ 781. Of the estates in mining claims under the statute — Extra-lateral rights.— Enough has already appeared herein to demonstrate that sub-surface and extra-lateral rights are controlled by surface boundaries;[1] and as thus limited and controlled, the right to pursue the vein on its downward course is expressly fixed and defined by statute.[2] That portion of the statute applicable to this branch of our inquiry reads as follows: "The locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes and ledges throughout their entire depth the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations."[3]

The rights thus conferred by the statute are absolute, and when intelligently claimed are just as complete and capable of ascertainment and protection before or without a patent as they are under or by virtue of it. The patent confirms but does not create rights; the law is paramount, and all rights are creatures of it. The patent, when one is issued, neither adds to nor takes from any of the rights acquired under the statute. It establishes by its record permanency of lines and certainty as to boundaries. It terminates the duty of doing assessment work, and extinguishes the possibility of surface conflicts; it in no way enlarges the rights conferred by statute, but on the contrary necessarily subordinates itself to the statute.

§ 782. Meaning of the term "extra-lateral rights."— The right to pursue the vein on its downward course, even

[1] *Ante*, §§ 765, 766, 776, 777. See also note 2, *infra*, and cases; also *post*, ch. II, this Part.

[2] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540; Doe v. Waterloo M. Co., 54 Fed. Rep. 937; Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 892; Iron Silver M. Co. v. Campbell, 17 Colo. 267, 29 Pac. Rep. 573; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 208.

[3] R. S. U. S., § 2322.

though it should so far depart from the perpendicular as to enter the land adjoining, is called the extra-lateral right. More accurately speaking, it is the dip right. It is the new estate severed from and carved out of the common-law right of an adjoining proprietor, whereby the owner of the apex of a vein, with lines properly marked on the surface, has the right to enter the adjoining lands of his neighbor and remove the ore therefrom, provided only that he is following his vein on its downward course, and that he can establish its identity with the apex which he owns, and is pursuing it within lines authorized by the law.[1] For the term itself, by which we express this right, we are indebted to Mr. Raymond.[2] Mr. Willard Parker Butler expresses the same right in the words "right of lateral pursuit."[3] As said by Mr. Lindley: "Either expression, when used in connection with the federal mining laws, is free from ambiguity and sufficiently explicit."[4]

In one sense it is an enlarged right granted by the statute to the owner of a mining claim so located that the right is capable of being asserted. But more accurately it is a mining right or estate severed from the neighboring land, the estate in which is proportionately diminished in consequence thereof.

§ 783. **Controlling value of surface lines.**— In every attempt to exercise and make available the dip right, the controlling value of correctly laid surface lines is made apparent. Since the rule is, as we have attempted to show, that the surface owner is presumed to own all beneath his surface within the vertical plans of his boundaries, the apex owner must so lay his surface lines as to satisfy the statute. That is to say, his rights being confined to such outside parts of

[1] Butte & B. M. Co. v. Societe Anonyme des Mines de Lexington, 23 Mont. 177, 58 Pac. Rep. 111.

[2] Law of the Apex, Trans. Am. Inst. Min. Eng., vol. XII, p. 367; Lindl. Mines, 565.

[3] School of Mines Quarterly, July 1886.

[4] Lindl. Mines, *supra*.

the vein as lie between the end lines of his claim, either the actual end lines or those which the law creates, extended in their own direction, it becomes essential that he so place his lines upon the surface as to cover the apex of his vein, and give him the right to follow the dip between his end lines, for he will be confined, in the pursuit of this right, to such outside portions as can be lawfully so reached.

While, as we have seen, this extra estate is given to every locator of a mineral vein and confirmed by the patent, if he obtains one, it is strictly upon the condition that he so establish his lines upon the surface as to include whatever portion of his vein he desires to mine outside the vertical planes of his surface ground, for however, right or wrong, the law may be, and notwithstanding there is a severance of estate, as we have seen, the rule is firmly established that the common-law maxim applies, and that agreeably thereto, until a better right is shown, he who owns the surface is presumed to own all beneath.[1]

§ 784. Parallelism of end lines made essential by the statute of 1872.— We have attempted to outline the pervading spirit of the mining law prior to the statute of 1872, and to demonstrate that the essential principle of that law required that end lines be parallel. Following this principle, and as an expression of this experience, the statute of 1872 expressly required that the end lines should be parallel.[2] And while this statute is said by some courts to be directory merely,[3] a substantial departure from it cannot

[1] Leadville M. Co. v. Fitzgerald, 4 M. R. 385, 15 Fed. Cas. 98, No. 8,158. See also Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 208; Cheeseman v. Shreeve, 87 Fed. Rep. 36.

[2] Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463; Walrath v. Champion M. Co., 63 Fed. Rep. 552; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 208; King v. Amy & Silversmith M. Co., 152 U. S. 222; Argonaut Cons. M. Co. v. Turner, 28 Colo. 400, 48 Pac. Rep. 685; Del Monte M. Co. v. New York & L. C. M. Co., 66 Fed. Rep. 212; s. c., 171 U. S. 55, *sub nom.* Del Monte M. & M. Co. v. Last Chance M. Co.

[3] Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819, No. 4,548; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. Rep. 197.

be tolerated,[1] as such a course would result in a practical nullification of the statute, which was intended to give the miner the same length of the vein beneath the surface as he has of the apex — no more, no less.[2] If this principle is followed, much of the difficulty will vanish.

§ 785. Distinctions between such estate and the common law.— It will thus be seen at a glance that the law engrafts a new estate upon the ordinary grant, by the patent, unknown at the common law. This grant, following the language of the statute and the authority therein contained, is usually made in substantially the following words (*mutatis mutandis*): "That the grant hereby made is restricted to the land hereinbefore described as Lot No. 298 with nine hundred and forty-two linear feet of the Aurora lode, vein, ledge or deposit for the length aforesaid throughout its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey." And the limitation is usually expressed in substantially the following words: "That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit." We shall enlarge upon this limitation and estate in the succeeding section.

[1] Walrath v. Champion M. Co., 63 Fed. Rep. 552; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; Del Monte M. Co. v. New York & L. C. M. Co., 66 Fed. Rep. 292; s. c., *sub nom.* Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55; Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. Rep. 273; Butte & Boston M. Co. v. Societe Anonyme Des Mines De Lexington, 23 Mont. 177, 58 Pac. Rep. 111.

[2] Cons. Wyoming G. M. Co. v Champion M. Co., 63 Fed. Rep. 540.

§ 786. **And first, the common-law estates.**— Although it is not our purpose to deal at any considerable length in elementary principles, it is necessary to do so occasionally in order that distinctions and limitations may be fully appreciated. Thus, the elementary principle of the common law is that the owner of the fee simple of the surface, if an unsevered estate, owns the wedge of earth made by extending his lines downward vertically to the center of the earth. Under the mining law he has, subject to the conditions and limitations mentioned in the succeeding sections of this chapter, the same estate.[1] He has also the —

§ 787. **Additional estate created by statute.**—This additional estate peculiar to mining, created by the statute and always expressed in the patent, when one obtains a patent, authorizes him to pursue his vein on its downward course to endless depths, provided only that he has the apex thereof within the wedge of earth made by the vertical planes of his surface lines, and such surface lines are so laid as to authorize the pursuit thereof in the manner hereinafter indicated. And this right, by its plain terms, reaches to any depth he may choose to go, provided he is following the vein within the planes of his end lines, or such lines as the law establishes as such, and he is able to establish the identity of his vein.[2]

But, as we have already seen, the law impresses certain—

§ 788. **Limitations upon this grant.**— Thus, as the mine owner has the right to penetrate his neighbor's ground in

[1] Rush v. French (Ariz.), 25 Pac. Rep. 816.

[2] Flagstaff M. Co. v. Tarbet, 98 U. S. 463; Empire M. & M. Co. v. Tombstone M. & M. Co., 100 Fed. Rep. 910; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Tyler M. Co. v. Last Chance M. Co., 71 Fed. Rep. 846; s. c., 157 U. S. 683; Del Monte M. & M. Co. v. New York & L. C. M. Co., 66 Fed. Rep. 212, 171 U. S. 330; Argonaut M. Co. v. Kennedy M. & M. Co., 63 Pac. Rep. 148; Doe v. Sanger, 83 Cal. 203, 23 Pac. Rep. 365; Driscoll v. Dunwoody, 7 Mont. 394, 16 Pac. Rep. 726; Butte & B. M. Co. v. Societe Anonyme Des Mines De Lexington, 23 Mont. 177, 58 Pac. Rep. 111; King v. Amy & Silversmith M. Co., 9 Mont. 543; s. c., 152

the pursuit of the vein on its dip or downward course for the purpose of mining and extracting the ores therein contained, so has his neighbor or adjacent claim owner the right to pursue his vein in the same manner. And it matters not whether they be veins dipping in the same direction, or veins dipping in opposite or different directions, and thus constituting cross-veins; that is to say, veins crossing upon the dip, or uniting upon the dip, or constituting spurs and offshoots, as hereinafter considered.

§ 789. No right to prospect in neighbor's ground.— While the owner of the apex has the right to pursue his vein on its downward course and has the right to mine, extract and remove all ores therein contained, as we have already seen and will again advert to, and while for this purpose he has the right to dig all needful shafts and run all necessary drifts and tunnels, levels and stopes, he has not the right to go prospecting or exploring in his neighbor's ground in search of minerals supposed to apex in his ground, nor to conduct a vein-prospecting exploration in his neighbor's ground.[1] His rights are only protected by the fact of following the vein on its dip or downward course,[2] and providing proper avenues for the removal of all ores belonging to him. He is said to be *prima facie* a trespasser when he is outside his own surface boundaries; and his right in his neighbor's land must be clearly shown or it does not exist.[3]

U. S. 222; Jones v. Prospect Mt. Tunnel Co., 21 Nev. 339, 31 Pac. Rep. 642; Illinois S. M. & M. Co. v. Raff, 7 N. M. 336, 34 Pac. Rep. 544; McCornick v. Varnes, 2 Utah, 355; St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 654.

[1] Blue Bird M. Co. v. Murray, 9 Mont. 568, 23 Pac. Rep. 1022; Iron Silver M. Co. v. Murphy, 3 Fed. Rep. 368.

[2] Hyman v. Wheeler, 29 Fed. Rep. 853; Cheeseman v. Shreeve, 40 Fed. Rep. 787, 795; s. c., 37 Fed. Rep. 36; Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463; Iron Silver M. Co. v. Murphy, *supra*.

[3] Butte & B. M. Co. v. Societe Anonyme Des Mines De Lexington, 23 Mont. 177, 58 Pac. Rep. 111.

§ 790. Identity and not continuity the test of the right. It has sometimes been thought, and indeed there are some cases leaning towards the idea, that essential to the right to follow the vein on its downward course it must preserve an unbroken continuity in its descent into the earth. More extended experience, however, into the principles of mining law and a better knowledge of the facts which surround and attend the formation of mineral veins themselves, have led courts to the adoption of the more rational, and, at the same time, the more just conclusion, that identity is all that the law requires in order to justify the miner in following his vein into neighboring ground. Every student of geology knows, and every mining lawyer knows, that step faults are of every-day occurrence in coal-mining regions. They are also of frequent occurrence in regions where precious-metal mining prevails. An example of this is shown in the following figure from a leading work on geology:

Figs. 8, 9. [Le Conte, pp. 231, 232.]

It is manifest that if either of these folds contained, between the different character of stone, a bedded vein of mineral-bearing rock, identity and not continuity would be the only rational solution of the difficulty, unless enough

is dragged into the fault to make it continuous. The irresistible conclusion then is, that the law must be satisfied, if the identity of the vein can be satisfactorily established by evidence, with the same reasonable certainty that ordinary facts are otherwise demonstrated in courts of justice.

This question was elaborately and thoughtfully considered in a late case by the supreme court of Montana, and as an illustration and a careful exposition of the law we reproduce excerpts from the opinion: "On principle the identity of the apex of a vein with its spurs or extensions must be the crucial test by which are to be found the proprietary rights to that vein and the mineral therein. The full benefit of his discovery is what section 2322, *supra*, preserves to the miner; and to meet the geologic conditions which exist in the tendency of veins to depart from a perpendicular as they go downward, that the object of the statute might be carried out, section 2322, Revised Statutes of the United States, authorizes a miner to follow the vein on its dip to an indefinite length, wherever it goes, provided, of course, he has the apex, and provided further, he does not cross the vertical planes of the end lines. . . . Identity must always exist. Were there any departure from this rule, the miner might secure the benefit of more than he discovered, which was never contemplated by the law. Identity in mineral deposit should have no significance not usual to identity of many other material things. It means the same thing, or the same vein. It may be said to include a vein that is incessant. But a vein that is incessant or identical in its parts is not necessarily a vein which is continuous, in the sense that the continuity or union of its parts is absolute and uninterrupted. In other words, though a continuity of vein does not preclude identity of vein, yet identity does not necessarily include continuity, in the exact sense just referred to. 'Law of continuity' (Math. and Physics), says Webster's Dictionary, 'the principle that nothing passes from one state to another

without passing through all the intermediate states.' Speaking exactly by this definition, it would often be very difficult, if not impossible, for the challenged proprietor of a mineral vein to convince a jury of the continuity of the vein from one part to another, for there might not be continuity by actual contact of the parts, or contiguity, which the precise word may literally mean must exist. Were such a rule inexorable, a failure of proof would not infrequently be brought about by the inability of the miner to prove continuity without transition through intermediate states. The miner, therefore, might fall short of that exact measure of evidence required to establish a continuity of vein which excludes any interruption between one and another part of the identical vein, and, judged by too closely interpreted significations, the continuity of the vein would be lost; yet, if he prove the identity of his vein by some incessant feature, in our judgment the right to pursue the lode on its dip is his, and there should but remain the necessity of going to the surface limits to accurately adjudicate the lines defining the right to the vein so identified. . . . The true sense in which there must be a continuity of vein is therefore a qualified one, and not an unqualified, exact one, irrespective or independent of physical conditions found in mining. It may be said as a paraphrase of the decision cited that identity is essential, and the vein must be continuous, but its continuity may be interrupted, even to a closure of the fissure, without destruction of the identity, provided the extent of the interruptions or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact."[1]

[1] Butte & B. M. Co. v. Societe Anonyme Des Mines De Lexington, 22 Mont. 177, 58 Pac. Rep. 111, 113, 114, 115. See also Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S. 205; Iron Silver M. Co. v. Murphy, 3 Fed. Rep. 368; Blue Bird M. Co. v. Murray, 9 Mont. 468, 23 Pac. Rep. 1022; Cheeseman v. Shreeve, 40 Fed. Rep. 787; Stevens v. Williams, Fed. Cas. No. 13,413, 23 Fed. Cas. 40; Jones v. Prospect Mt. Tunnel Co., 21 Nev. 382, 31 Pac. Rep. 642; Leadville M. Co. v. Fitzgerald, 1 McCrary, 480, 15 Fed. Cas. 98.

§ 791. Guiding rules for interpreting the statute — Common-law rule ignored.— It is but fair to state that in all decisions of the courts where the apex rule has been drawn in question — apex cases so called — there has been uniformly a conscientious attempt to seek out and express the legislative will without reference to the common-law rule that statutes in derogation thereof should be strictly construed. Indeed, it is a moot question whether it can be said that this statute really is in derogation of the common law. It impresses a new estate upon the mining claim and in favor of the mining proprietor, it is true, but, as we said in the beginning of this part of our work, it is more in the nature of a statutory severance than it is in the nature of creating and imposing a new and independent servitude.

§ 792. The common-law right as applied to extra-lateral right.— Regarding the right of the common law itself, as the same is persistently insisted upon by some courts when there is difficulty in finding any other way to turn, it is not inapt to say that it often becomes the *pons asinorum* of the courts. Whenever a case is found which is difficult of solution by reason of being different from all the adjudged cases, some courts resolutely close their eyes to new paths, sought to be marked upon lines recognizing the controlling thought that congress intended to give to the locator as much of the vein throughout its entire depth as he has of the apex; turn their faces from the other potent factor that congress undoubtedly intended to make and did make a severance of the mineral vein, with its incidental and expressed rights, from the rest of the estate, and have insisted, in the teeth of this last expressed statutory right, that the common law, which had nothing to do with creating the estate in the first instance, this having been granted solely by statute, had, in some mysterious manner, so impressed itself upon the grant, not as given by the patent, but in direct opposition to it, that ownership of the surface creates

almost a conclusive presumption of ownership of all beneath.

The fallacy of this reasoning is shown, not only by the statute, but by the terms of the patent, as elsewhere shown in this work.[1] The truer presumption ought to be that if a vein of ore is found beneath the surface of a claim which is conclusively shown to apex outside of such claim, it affords proof equally conclusive, that, whoever else may own it, the owner of the particular surface not containing its apex does not own it, at least until it is shown that, within the rules controlling the right to follow the vein on its dip, no other person can claim it, or that the right is at best doubtful. Nor is this the assertion of a principle that will annihilate or even work hardship on the mining industry. On the contrary, it will ultimately preserve it. Since a location cannot be lawfully made until a discovery is made that will satisfy the law, as elsewhere laid down in this work, and since the discovery must be upon the apex, the enforcement of these rules will only entail upon the miner the necessity of beginning at the apex and working down, instead of beginning somewhere else upon the vein and working in every direction. The common-law right, then, should be applied only when no other right can be asserted, or when all others are at best doubtful.

Speaking of the principle which ought to control under circumstances of this kind, Judge Beatty, in the circuit court for the district of Idaho, recently said: "This I consider applicable only when there is doubt as to what apex an underground body of ore may belong."[2] Enlarged applications of this principle have been frequently denied by the courts,[3] but the quotation above referred to indicates the true reason and the better trend of judicial thought.

[1] See *ante*, § 785.

[2] Bunker Hill M. Co. v. Empire State Idaho M. D. Co., 106 Fed. Rep. 471, 474.

[3] State v. District Court (Mont.), 65 Pac. Rep. 1020.

Article D.

In Which "Apex" is Defined and Considered.

§ 795. Of the general meaning of vein or lode.
796. Preliminary observations as to the use of the word "apex" in the statute.
797. Some general definitions of "apex"— Outcrop nor highest point not necessarily apex.
798. Definition by Judge Hallett.
799. Definition of "apex" as applied to broad vein or zone theory.
800. Same subject— Discussions by the courts and law writers— Some thought of denial as to extra-lateral right— Oldest claim takes all.
801. Early thought as to vertical boundary on divided vein— Time considered.
802. Of the apex of a blanket or flat vein— The Duggan-Davey, Sierra Nevada and Leadville cases.
803. Question decided by priority of ownership— St. Louis-Montana case.
804. Another reason for the rule— Prevents assertion of right between diverging lines.
805. Comments and conclusions— Controlling force of the principle, "First in time strongest in right."
806. Controlling value of apex ownership— Question raised in trover case (note).

§ 795. Of the general meaning of vein or lode.— We have already elaborated at considerable length in the chapter relating to discovery, upon the meaning and definition of lode or vein, therefore we do not purpose any unnecessary repetition at this time. In the former part we spoke of the definitions which the courts have bestowed upon the different aggregations of mineral *in situ*, or in place, usually comprehended by the generic term "lode." The statute uses the words "vein or lode," and they are sufficiently broad and comprehensive to include any aggregation of mineral *in situ*. At the same time one cannot read the statute in its entirety and so consider it without being impressed with the idea that the framer of the law had in mind, by the use of the words "vein and lode," a fissure in the earth's crust more or less vertical, filled with mineral vein stuff carrying

more or less of the metals named in the statute. But we have seen that the courts have wisely interpreted the statute in a broad sense so as to include within the meaning all forms of mineral aggregations in place, and that it is quite immaterial to the question whether they are in well defined fissures or beds or between plainly discernible contacts of different kinds of rock, or whether, again, they are in a series of deposits, vugs or displacements and replacements common to limestone regions, and only connected by the similarity of the limestone, dolomite or other country rock in which they are found; because in the latter cases the ore deposits will be found as true to the particular kind of stone, which the solutions carrying the metals have eaten out and displaced, as if found within a true fissure or between beds of different stone. It is likewise immaterial to the purposes and objects of the statute, what, if any, inclination the vein or deposit has from the horizontal. It is sufficient, we think, that it departs from the surface of the earth, and has clear, inclosing rocks on either side.

§ 796. Preliminary observations as to the use of the word "apex" in the statute.— The word "apex" has, in mining, a peculiar and technical meaning. It has been defined as the highest point of anything —the top.[1] It was evidently used in the statute with reference to an enlarged and technical meaning, as the statute contains the words "top or apex." It was certainly unnecessary to use it in this form to indicate the mere top, for that would be understood just as well if used alone. The courts have applied many definitions, some differing from others, but generally they reach the conclusion that the apex means the beginning or edge of the vein or lode; that portion which approaches nearest the surface of the earth. It is sometimes synonymous with the word "outcrop," and where the edge or beginning of a vein comes to the surface on the strike thereof, it is correctly so used; but if the exposure is one of the dip or partially of the

[1] Cheesman v. Shreve, 37 Fed. Rep. 86.

dip and strike it would be technically incorrect. We understand it to mean that part of the strike of the vein which forms its outer edge — the edge nearest the surface of the earth,— whether it be in fact its highest point or not.

§ 797. Some general definitions of "apex" — Outcrop nor highest point not necessarily apex.— Thus it is that the apex of a vein, as understood in mining parlance, generally means that portion of it which constitutes the beginning, or, conversely, the end; and generally approaches nearest the surface of the ground.[1] It is not necessarily the highest point of the vein, which might be accomplished by a swell in the hanging wall.[2] Nor is it necessarily the outcrop, because that may be a dip exposure.[3]

In the former pages of this work[4] we have discussed at length the definitions of a vein or lode, of rock in place, and of the strike of the vein. This discussion makes it unnecessary to repeat here, at this time, at great length, the language of the courts in defining the meaning of the word "apex." We shall therefore content ourselves with statements from a few leading cases and leading works.

§ 798. Definition by Judge Hallett.— In an early case the meaning of the word "apex" was defined by Judge Hallett as follows: "The words used (speaking of the statute) are 'top' and 'apex,' as if the writer were somewhat doubtful as to which word would best describe or best convey the idea which he had in mind. It was with reference to that part of the lode which comes nearest the surface that this description was used. Probably the words were not before

[1] Iron Silver M. Co. v. Murphy, Iron Mine v. Luella Mine, 3 Fed. Rep. 368, 373; Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887; Stevens & Liter v. Williams, 1 McCrary, 480, 23 Fed. Cas. 40, Nos. 13,413, 13,414.

[2] Gilpin v. Sierra Nevada M. Co., 2 Idaho, 662, 23 Pac. Rep. 547; Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887; Colorado Central M. Co. v. Turck, 70 Fed. Rep. 301; Illinois S. M. Co. v. Raff, 7 N. M. 336, 34 Pac. Rep. 544.

[3] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887.

[4] *Ante*, §§ 285, 289.

known in mining, at least they are not met with elsewhere so far as I am informed. Perhaps they were not the best that could have been used to describe the manner in which the lode could be taken and located. . . . We are all agreed, however, . . . that that is the meaning of the words, and that they are to be taken in some such sense as that, as being the part of the lode which comes nearest the surface."[1]

§ 799. Definition of "apex" as applied to broad vein or zone theory.— In limestone regions, what has been termed a "broad vein" or "mineralized zone" is sometimes found where the vein matter between defined boundaries or within the boundaries of mineralization, as in some cases of veins of substitution, has been found wider than the ordinary mining claim.[2] These cases sometimes present the question of a series of deposits between defined boundaries; in other cases, the boundaries are not so well defined, but may be said to be the end of the mineralization in the cases of veins of substitution. In all such cases, the apex means the entire top of the vein or ore matter between the boundaries, bounding planes or walls, as the case may be. For it is said to be sufficient to give the right to pursue such vein or ore body on its downward course, that its surface exposure, or apex as herein defined, never wholly departs from the vertical bounding planes of the location.[3]

§ 800. Same subject — Discussions by the courts and law writers — Some thought of denial as to extra-lateral right — Oldest claim takes all.— In the previous sections we have merely discussed the question as an ab-

[1] Stevens v. Williams, 1 McCrary, 480, 23 Fed. Cas. 40, 44; Iron Silver M. Co. v. Murphy, 2 McCrary, 121, 3 Fed. Rep. 368.

[2] Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3, 11 Pac. Rep. 515.

[3] Id. See also Butte & B. M. Co. v. Societe Anonyme Des Mines De Lexington, 58 Pac. Rep. 111, 23 Mont. 177; Leadville M. Co. v. Fitzgerald, 15 Fed. Cas. 98, No. 8,158; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819;

stract proposition; that is to say, what ownership of apex, as applied to broad veins, would be sufficient to accord to the owner extra-lateral rights, independent of the question of an adjoining proprietor claiming to own some portion of the apex. In the leading case cited, from which we will quote further on in this section, the lode was broader than the mining claim under which extra-lateral rights were claimed, and the defendants contended that because of this, and because there was no provision of the law authorizing the bisecting of a vein laterally on its strike, therefore lines must be drawn vertical and extra-lateral rights denied. In denying this result as attributable to the statute, Mr. Chief Justice Zane used the following words: "Does this language mean that the apex must be entirely within those lines, or that it must not be entirely without? When the apex lies partly within and partly without, was it the intention to segregate the vein, or, so to speak, to split it laterally? . . . Under this law the discoverer of any part of the apex gets the right to its entire width, despite the fact that a portion of the width may be outside of the surface side lines of his claim extended downwards vertically. While he has no right to the extra-lateral surface, he has a right to the extra-lateral lode beneath the surface."[1] Much of the foregoing has been recently settled by the establishment of the rule, which is agreeable with the general spirit of the law, that where a vein is bisected laterally on the surface by the dividing line between two claims the older in date of location controls and owns the entire vein.[2]

§ 801. Early thought as to vertical boundary on divided vein — Time considered. — In Carpenter's Mining Code, as quoted by Judge Boreman in his dissenting opinion

Bunker Hill & S. M. Co. v. Empire State Idaho M. Co., 106 Fed. Rep. 471.

[1] Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 8, 11 Pac. Rep. 515.

[2] St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 664.

in the Bullion-Beck Case,[1] there is an expression attributed to Judge Hallett (the case itself does not seem to be otherwise reported in full) to the effect that where the apex of the vein is in two or more locations bisecting it laterally, all are of equal dignity, and the relative rights can only be determined by the drawing of vertical lines. At all events, it was expressly held that the locator only got what was covered by the location. It is sufficient to say of this, however, that it has not been followed; and the later and better rule, settled upon the lines of strongest reason, as shown in the last section, is that the older vein holding any part of the apex must own the whole of the apex and the extra-lateral rights accordingly. This might raise a very nice question in the case of contiguous locations made on the same day, since it is a well-known rule of law that parts of a day are not considered, and for many purposes the last minute is of equal importance, value and strength with the first minute thereof. But happily, as a general rule in practice, the hour of recording, and sometimes of locating, is given, that would undoubtedly assist in determining the question; but in all cases, we think, this would have to be settled the same as any other question of fact.

§ 802. Of the apex of a blanket or flat vein — The Duggan-Davey, Sierra Nevada and Leadville cases.—There are at least three ways in which reputable courts reach erroneous conclusions: (*a*) By correct reasoning from incorrectly laid or incorrectly assumed premises, including an assumed fact which is disputed and erroneously found. (*b*) By incorrect inverse or imperfect reasoning from perfectly established premises. (*c*) By an imperfect understanding of the premises, as an incomplete analysis of the principles and decisions controlling the questions involved. The first proceeds solely from the innate infirmity of weak human nature, or from imperfect establishment of facts, concerning

[1] Bullion-Beck & C. M. Co. v. Eureka M. Co., 5 Utah, 1-75; Carpenter's Min. Code (3d ed.), p. 65.

which reasonable men may honestly differ; the second proceeds from lack of adequate knowledge of controlling principles, or inability to reason consecutively on any question; the third, from an incomplete record or negligence in examining the questions involved, or from both. The Dakota case,[1] the Idaho case[2] and the Leadville cases we have under consideration,[3] all presented questions of vein exposure on the surface,— apex exposures, we venture the opinion, notwithstanding the decisions, with the veins nearly flat, and each passing into the mountain which inclosed it almost horizontally, in some cases possessing slight local synclinal folds, but the average generally amounting to a slight inclination below the horizon at a right angle from the surface exposure. By a singular fatality the decision in neither case can be upheld, and, at the same time, the purpose of the law vindicated. In the two former cases the fault lay with the court, and in all the Leadville cases the fault was with the jury, which, by an unwritten law prevailing in that district, refused to recognize extra-lateral rights upon the Leadville veins, as we have shown in another part of this work.

In the Dakota case the trial court blindly followed the theory of the plaintiff, called the outcrop a dip exposure instead of the apex of the vein, holding the apex to be somewhere else on the hill to the west. We beg to say again, as we have elsewhere said, that there was a very slender thread upon which to base this conclusion of fact which was decisive of the case. And as to the rights of the parties before the court, speaking of their rights as relative, which

[1] Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887.

[2] Gilpin v. Sierra Nevada M. Co., 2 Idaho, 662, 23 Pac. Rep. 547, 1014.

[3] Stevens and Liter v. Williams (two trials), 1 M. R. 557–66, 23 Fed. Cas. 40–44, Nos. 13,413–14; Stevens v. Gill, id. 23, No. 13,398, 1 M. R. 576. See the note to this case, 1 M. R. 562; Iron Silver M. Co. v. Cheesman, 8 Fed. Rep. 297, 9 M. R. 552; s. c., 116 U. S. 529, 29 L. ed. 712; Iron Silver M. Co. v. Murphy, 1 M. R. 548, 2 McCrary, 121, 3 Fed. Rep. 868. See also Hall & Marshall v. Equator M. & S. Co., cited 5 Utah, 76, partly reported in 11 Fed. Cas. 22.

was, or should have been, the question to be decided, the defendant had the stronger right and sufficient to entitle him to the decision. The reasoning of the court upon the false premise thus assumed, and which was adopted by the supreme court of the state, was superb, and as faultless in its logic as any opinion in the books. But, because the premises were false, the court reached the inevitable false conclusion that the Sitting Bull claim did not own the ore because located upon the dip instead of the apex.

The Idaho case was presented upon a motion for a preliminary injunction, which was denied by the trial court, Judge Sweet, and reversed by the supreme court, by a decision participated, in matter of opinion, by all three judges, but in which Judge Beatty gives the only sensible reason for reversing the case, namely, the matter being in doubt it ought to be resolved in favor of the injunction. Judge Berry, who wrote what was intended for the prevailing opinion, wallowed through a mass of words attempting to demonstrate that the ore body was flat and therefore there was no dip, nor extra-lateral right, and the location of the Sierra Nevada was not upon the apex, but upon some other part of the vein. Judge Sweet, who tried the case, gives the key to the situation in his dissenting opinion,[1] in which he demonstrates that the general strike of the vein, when uncontrolled by local conditions, was northwest and southeast, and the true dip at right angles therewith to the southwest, which would give the Sierra Nevada the dip rights it claimed in accordance with the law.

Regarding the Leadville cases, in each one the law was carefully laid down by the court and the definition of apex properly given, and it was no fault of the law, nor any denial of extra-lateral rights as a principle, that the jury decided the other way. In all those cases the law was accurately stated to the effect that that is the apex of a vein which approaches nearest the surface of the earth, the be-

[1] 28 Pac. Rep. 1014.

ginning, or, reversely, the end; and the result is that it can make no difference whether the vein departs from the surface on the horizontal or perpendicular, or any angle between those points, the apex is the edge exposed in all cases.

Further as to the Dakota case. It is a common thing known to all mining men and mining lawyers that the entire set of beds of limestone is sometimes tilted horizontally and parallel with the true strike, absolutely demonstrated by a fissure vein with its top spreading out into the beds, and with a similar tilt or pitching or dipping into the earth at right angles therewith. The surface exposure in all such cases should be called the apex. If there be two surface exposures at right angles with each other, or nearly so, of apparently equal dignity, let the one agreeing with the general strike of the veins of the district be taken, if possible, or if that cannot be ascertained, let the one first selected, as such, control, and thus give practical effect to the vital principle of the mining law, first in time strongest in right. Besides, the miner who makes a location upon an actual outcrop of mineral upon the surface, ordinarily the best possible evidence of a vein and of its apex, ought not to be buncoed out of it by any hair splitting, theoretical opinion of a mining expert that he has after all located upon the dip instead of the strike. Infinite wisdom alone can determine the truth in some cases, and the miner first locating should be given the benefit of the doubt, if his location is well laid along a surface exposure, and with end lines so drawn across it as to give him what he seeks. He faithfully endeavors to comply with the law. It ought to protect him in his efforts. By any other rule than the one we lay down,

> His "faith is a heartless cheat,
> That bears the back for the Devil's rod,
> And scatters thorns for the feet."

§ 803. Question decided by priority of ownership — St. Louis-Montana case.—By logic which is indisputable, Judge Morrow, in the circuit court of appeals, decides this question, in a case where a vein twenty-five feet wide crossed a

side line at an angle of about thirty degrees and at which point, following the supreme court of the United States,[1] an end line was projected into the dip parallel with the real end line of the claim, and the question presented was whether such end line should be projected at the point where the foot-wall departed from the side line, or at the point where the hanging wall departed. The case will be better understood by the following diagram:

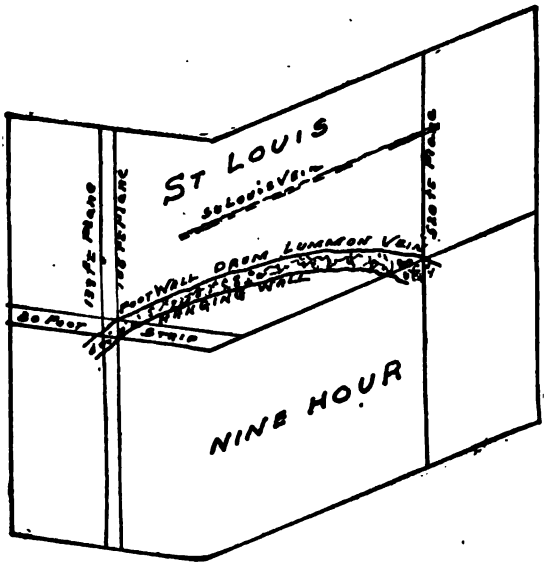

Fig. 10.

In holding that the question must be decided upon the theory of priority of ownership, and that in consequence thereof the ownership of any part of the vein was ownership of it all, the court uses these words:

"It might be said that the vein could be equitably cut by a plane parallel with and midway between the one hundred and eight and one hundred and thirty-three foot planes, thus bisecting the portion of the vein in controversy, and giving half of the disputed ground to each claim. But neither is

[1] Del Monte M. Co. v. New York & Last Chance M. Co., 171 U. S. 55.

there any authority for such a determination by the court. It would seem, therefore, that by some rule the entire twenty-five feet should be construed to apex in one of the locations. And as, where the rights of two mining locators are apparently equal with respect to mining ground, the element of priority of location is controlling, preference being generally given to the senior locator,[1] the entire vein would be given to plaintiff in error. If this be the true doctrine when a vein is vertical, why should there be any change in its application when the vein dips? The right of lateral pursuit is a right conferred by statute. It does not depend upon circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, save that it ceases when and at the point that it interferes with the statutory rights of another. In other words, the determination of a rule and its application to the case before the court should be the same whether the vein dips towards the junior location or towards the senior location, or does not dip at all. The defendant in error, in support of its contention that the right of extra-lateral pursuit only remains so long as the entire vein is within the claim, cites a Montana case,[2] the decision in which was affirmed by the supreme court of the United States.[3] But the question here involved was not there considered. It appears that in that case no attention was given to the width of the vein, its crossing of the side line being regarded merely as a point. No mention whatever was made of the width of the vein or of its apex. Reference is also made by the defendant in error to adjudications upon the class of veins called "split veins." But the case under review does not involve a split vein, and a different principle must apply. If then, in construction of law, the vein for the twenty-five feet in controversy must be either upon the one location or the other, and if the senior locator has prior-

[1] Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 484, 7 Sup. Ct. 1356, 30 L. ed. 1140.

[2] Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. Rep. 278, 30 L. R. A. 808.

[3] Id., 171 U. S. 92, 18 Sup. Ct. 941, 43 L. ed. 87.

ity of title, it would follow that the right of lateral pursuit would remain with the senior locator within a plane parallel to the end line of the senior claim, and up to the point of departure of the apex, or in this case the foot-wall. It may be said that the application of this rule will sometimes work hardship. It is true that hypothetical cases may be assumed, which as individual types may present difficulties in equitable adjudication. But the application of principles sanctioned by judicial authority furnishes the most effective solution of such problems, and will undoubtedly reduce the seeming inequities to a minimum."[1]

§ 804. Another reason for the rule — Prevents assertion of right between diverging lines. — A very cogent reason for this rule, and one which is conformable to the principles laid down in the foregoing sections, is given by Mr. Lindley in his late and very able work on the subject, where he inclines to the belief that priority of location is decisive of the case.[2] All of this is true as a general rule, but the application of it in all cases is sometimes most difficult. The intrinsic virtue of this rule, however, is finely illustrated in a late case in the circuit court of the ninth circuit for the district of Idaho.[3]

The facts and circumstances of the case are better illustrated by the diagram on page 698.

Here the plaintiff owned both the Viola and the San Carlos mining claims and the defendant owned the King claim. To give extra-lateral rights to both claims belonging to the plaintiff would be to extend those rights fan-shaped into the dip. To deny them altogether is not authorized by the law; besides it would be contrary to the spirit of the law, independent of the injustice of such a course. The court very properly denied any such prepnserous result as would flow

[1] St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 664, 668; Bunker Hill & S. M. Co. v. Empire State Idaho M. & D. Co., 106 Fed. Rep. 471.

[2] Lindley, Mines, § 588, p. 702.

[3] Bunker Hill & S. M. Co. v. Empire State Idaho M. & D. Co., 106 Fed. Rep. 471.

from accepting either horn of the dilemma above referred to, and gave the entire apex right to the senior claim,[1] which

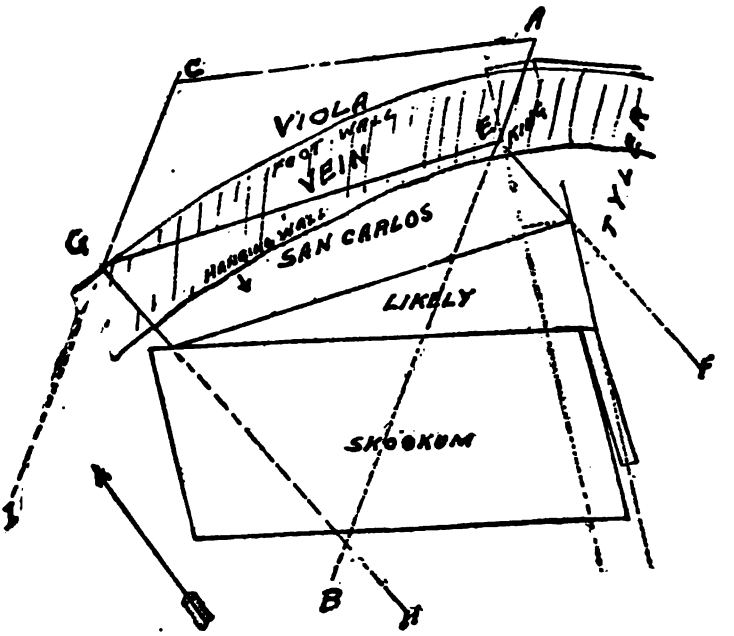

Fig. 11.

should be the rule if the claims were owned by different owners.

A far different question, however, is presented by the illustration on page 699.

Here the vein (marked V), a narrow one, crosses the common line entirely and recrosses. If both claims are owned by the same person, no serious consequences nor practical injustice would result from the application of the same rule as in the Idaho case, but is this the true solution? If owned by different owners, each would be entitled to as much of the vein throughout its entire depth as he owns of the apex, assuming, of course, that the vein located runs parallel with this one, or that they were properly located.

[1] Bunker Hill & S. M. Co. v. Empire State Idaho M. & D. Co., 106 Fed. Rep. 471.

Suppose lines and rights become fixed in this manner; they must, of course, and as a general rule, become fixed for all time and for all purposes. Suppose, again, one owner acquires them both with the attendant rights. Will or may

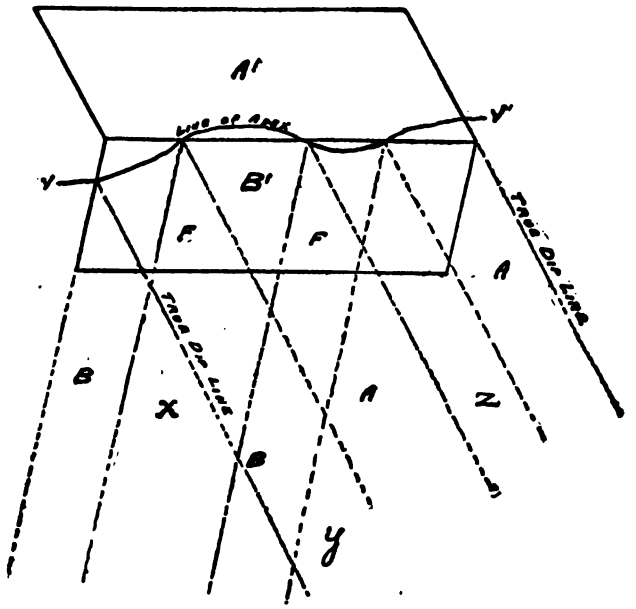

Fig. 12.

his rights become in any manner changed thereby? Unless the principle elsewhere contended for, that the rule shall apply, and extra-lateral rights be measured by the end line of the senior location and one drawn parallel therewith at the other point of departure from the entire claim, of course no additional or other rights can be acquired, and each will stand upon its own rights, which would distribute the portions from which the apex has been judicially cut off (marked X, Y, Z) upon common-law principles.

If they belong to separate owners, must the same rule apply, leaving A. and B. to pursue their rights obliquely through the strike and dip, agreeable to their surface lines, with the ore in the space F belonging to A., the senior loca-

tor under the statute;[1] or must their rights be settled in some other equitable manner?

Respecting the question presented by the first diagram, it is manifest that the courts have reached the only just solution admissible under the circumstances, namely, that priority of location controls.

But the second proposition, when considered in all its ramifications, is more difficult. Since the lines made by A. are controlling upon B. for the purpose of fixing the rights of A., why are they not so controlling for all purposes? In other words, why may not these judicially-made lines be called end lines for B., and in so doing decide the same as if all belonged to A.? Either this rule must be applied or it must be decided in the same way as though it all belonged to the senior location; in other words, it amounted to no more than a bisecting of the vein.

If it is answered that lines are thus made for B. different from what his location calls for, that result is obtained in any event. This principle was substantially recognized in a late case in Montana.[2] State legislatures could simplify matters and reduce many of these perplexing difficulties to a minimum, and at the same time be legislating within their conferred powers, by requiring end lines to be drawn at right angles to side lines, *i. e.*, the adoption of the perfect parallelogram in making locations.

§ 805. Comments and conclusions — Controlling force of the principle, first in time strongest in right.— It is a controlling principle, and justly recognized by the court in the case mentioned in the last preceding section, that the date of appropriation, as actually made or judicially determined, is an important factor in the right to follow the vein in its downward course, and is especially true in the case of spurs, offshoots and secondary veins, that is to say, veins found within the surface lines of the claim other than the one upon which the location was made. Likewise of veins unit-

[1] R. S. U. S., § 2336.

[2] State v. Court (Mont.), 65 Pac. Rep. 1020. See *post*, § 807.

ing on the dip. And the rule which we have had occasion to refer to when considering the surface conflicts in adverse suits, of "first in time strongest in right," applies with equal force here.[1] As said by Judge Morrow in the case mentioned in the last section, this rule sometimes works hardships; but it is better that there be hardships in individual cases than that the law remain unsettled. Besides, this rule is expressly admitted in the Nevada case.[2] We do not mean by this that the senior locator, having merely a fragment of the vein, ought to be permitted to invoke the rule; but we do say that where the question presented is one like the St. Louis-Montana case,[3] or like the Utah case,[4] or the Idaho case,[5] any other rule would be practically a denial of justice. We think that wherever the entire vein is found in one claim, and crosses into another, the older claim must of necessity own all of which it has any part of the apex.

§ 806. Controlling value of apex ownership — Question raised in trover case (note). — We have thus attempted to demonstrate the controlling value of apex ownership. Since the right to follow the vein on its downward course is confined to end lines projected in their own direction into the dip, the ownership of the apex becomes a vital and material question,[6] as the right is confined by the statute itself to

[1] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683; Hall v. Equator M. Co., note to 11 Fed. Cas. 225; Colorado Central M. Co. v. Turck, 50 Fed. Rep. 888, 54 Fed. Rep. 262, 70 Fed. Rep. 294, 17 C. C. A. 128; Eureka M. Co. v. Richmond M. Co., 3 Sawy. 302, 8 Fed. Cas. 819, No 4,548; Rico-Aspen M. Co. v. Enterprise M. Co., 53 Fed. Rep. 321.

[2] Rose v. Richmond M. Co., 17 Nev. 25.

[3] St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 664, 668.

[4] Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah. 3, 11 Pac. Rep. 515.

[5] Bunker Hill & S. M. Co. v. Empire St. Idaho M. Co., 106 Fed. Rep. 471.

[6] Butte & B. M. Co. v. Societe Anonyme Des Mines De Lexington, 28 Mont. 177, 58 Pac. Rep. 111; Argonaut Cons. M. Co. v. Turner, 23 Colo. 400, 48 Pac. Rep. 685; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; King v. Amy & Silversmith Cons. M. Co., 152 U. S. 222; Empire M. & M. Co. v. Tombstone M. & M. Co., 100 Fed. Rep. 910.

such portions of the vein as have their top and apex within the lines of the location.[1] Moreover, as we have already attempted to explain, and will demonstrate in the future sections of this part of our work, this right is confined between parallel lines produced in their own direction into the dip.[2] It is a well-settled proposition that a mining claim can have but two end lines, and that when any two lines are once established as such, even though one be imaginary and for the purpose of fixing extra-lateral rights only, those lines remain the lines of the claim for all purposes.[3]

§ 807. "Judicial apex" — Irregularly asserted dip rights.— The Del Monte case forcibly presents another question, only incidentally adverted to there, concerning what we may term the judicial apex; that is, where the dip rights of a properly made location are projected across another claim, partly on the strike and partly on the dip, in a different direction from the true end lines of the claim crossed. This necessarily leaves rights which may be claimed by the other location, under what may be termed a judicial apex. For example, let us reproduce the familiar diagram (on page 703) used in the reported case now under consideration:[4]

Here, it will be observed, the lines of the Last Chance are not parallel with those of either the New York or the Del Monte, though the latter two are substantially parallel to each other. The Last Chance, being the junior location,

[1] R. S. U. S., § 2322.

[2] See *infra*, ch. II, this Part. See also Leadville M. Co. v. Fitzgerald, 15 Fed. Cas. 98.

[3] St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep. 664, 667; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Walrath v. Champion M. Co., 171 U. S. 293. It has been held that the question of apex could be raised and tried in an action of trover for ore removed from a mine. Driscoll v. Dunwoody, 7 Mont. 394, 16 Pac. Rep. 726.

[4] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 43 L. ed. 72, 73. It will be observed that we have extended the lines r s, a d t, e h, b c, and f g, besides which we have added, for the purpose of illustrating the idea attempted to be conveyed, the further line x y from the west side line of the New York claim.

owns only that portion of the surface ground which does not conflict with the New York. This gives it so much of the vein on its dip as it possesses of the apex, that is, up to the point "r," where the apex enters the New York. But

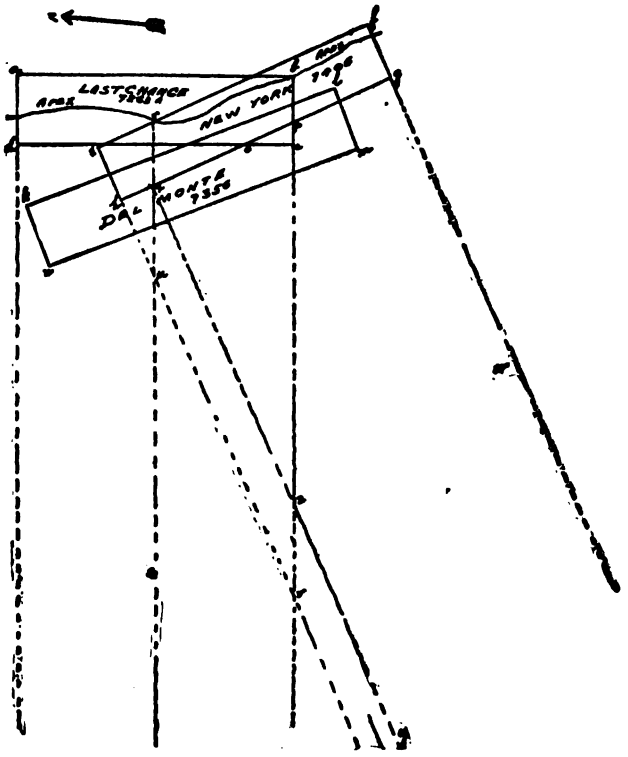

Fig. 18.

the New York is not extended to that line in measuring its rights, because this would give it diverging end lines. Instead, it follows one drawn parallel with its own southerly end line, and the question naturally arises: where shall that line be drawn? Clearly, at the extreme point where this determining line leaves the New York territory, because that must be considered, *pro hac vice*, the apex, or, in other words, the judicially-determined apex. And since the miner is entitled to as much of the vein on its dip as he possesses

of the apex, it must follow that, in measuring those rights, he is entitled to follow the dip to the farthest extent that he possesses any portion of the apex. But the question arises: to whom does the vein belong after the crossing point of the different rights has been passed? The court plainly intimates an intention not to restrict this dip right in any manner within common-law principles. But that, since the junior locator, the Last Chance, owns it all within its own end lines, except for the claim of the senior locator, the New York, when those rights have all been satisfied, it owns the vein beyond the uttermost plane of interruption, to endless depths. The justice of such a decision is manifest, but it is equally plain that it must be strictly confined to claims owning some portion of the apex, and can never be asserted to a segment of the vein to which the claimant has no apex right. To illustrate, take the following diagram:

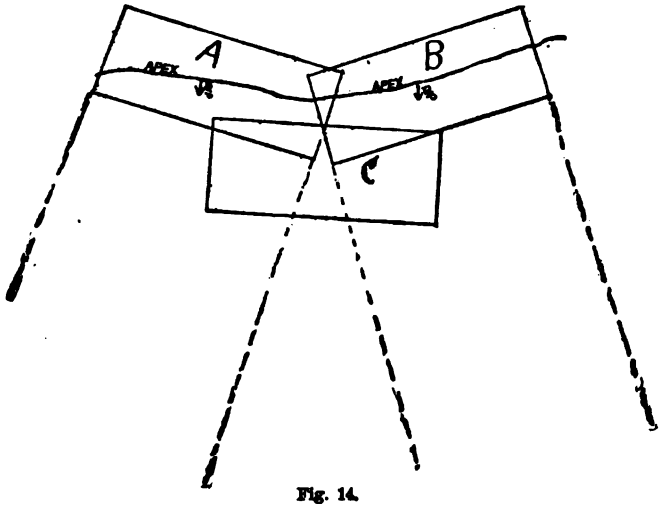

Fig. 14.

Here A. and B. have extra-lateral rights by virtue of their apex, but C. has none because he has no apex. But he is entitled to all the ore on the dip of the vein within the vertical planes of his boundary lines not included within the extended end lines of A. and B. And this rule should

also measure the rights of any other locator on the dip of the vein south of C.'s south side line. Because the right of any person to follow the vein extra-laterally is confined to his ownership of the top or apex, and if there is no ownership of the apex, the owners of any part of the vein on the dip must be relegated to their common-law rights — to all within their surface lines, all drawn vertically. The distinction between the case supposed and the Del Monte case is that here there is no crossing of apex rights. Of course in that case, as in the case suggested, there will be an ultimate wedge which can be claimed only upon common-law principles. But this rule should never be invoked except in this or similar cases, where there is no person owning the apex or any portion of the apex of the vein in dispute.

The New York was not a party to that litigation, and of course its rights were not determined, though they were incidentally referred to, such reference, however, not being necessary to a decision of the questions before the court. In discussing the possible rights of the Last Chance to pursue the vein on its dip at any point south of the projected line r s, the court speaks of the vein south of the line e h, projected beyond its intersection with r s, as the property of the New York, but there is no warrant in law for any such right north of point x, for want of an apex. Whether the court will adhere strictly to this *dictum* in the future, and hold that a location like the New York is entitled to all the vein north of the line f g w continued, and south of e h v, below the point u, where the latter intersects the line r s, remains to be seen. It would seem that up to the point where the judicial end line of the Last Chance, r s, crosses the west side line, g h, of the New York, there is strong reason for saying that the New York apex may be extended, but beyond there, its rights should cease for want of an apex, or anything that may be called an apex; and that the New York is entitled to all the vein between its end lines south of the line x y. Because, as to this, it possesses all the apex except the portion at the upper side judi-

cially determined to belong to the Last Chance, whose dip rights are as if laid along the apex, leaving the unclaimed wedge of the vein to be considered as such. This suggests the further question as to the ownership of the vein on its dip between the lines x s and x z v continued. And since, as we have said, the rights of the junior claim (the Last Chance) were only curtailed to satisfy those of the older claim (the New York), when such rights are satisfied, we are unable to see why the rights of the Last Chance should not be resumed, and it be awarded all the dip within its end lines extended, not belonging to the New York by virtue of such surface priority. This upon the ground that the Last Chance is a perfect location with the apex crossing both end lines, and its rights can only be questioned by the New York location.

Article E.

In Which "Strike" and "Dip" are Defined and Considered.

§ 810. Definition of "dip or downward course" — The statute.
811. Some definition of the word "dip."
812. Other definitions.
813. Definition of "strike."
814. Conventional, or judicial dip and strike.
815. Hanging wall and foot-wall.
816. Country rock and debris.

§ 810. Definition of "dip or downward course" — The statute.—In defining the terms employed to mark the miner's rights, the statute has departed from the beaten paths in some respects and employed new terms and definitions. The statute uses the words "throughout their entire depth," "exterior parts," and "downward course" to indicate the same meaning as that generally understood by the word "dip."[1]

[1] R. S. U. S., § 2322; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819; Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887.

§ 811. Some definitions of the word "dip."— Dip is a word long known in miners' parlance, and, as thus known, it means the angle of the vein made with the plane of the horizon; and as generally understood, it forms a right angle with the onward course or strike, as herein defined.[1] The statute uses the words "downward course"[2] to impart the same meaning. It may be said to be the inclination from the horizon which the vein or stratum makes as it proceeds toward the center of the earth, or at least in its departure from the surface or horizon.[3] As it is not always essential that it pursue a downward course, it is sufficient that there is a departure from the surface.[4] As said by Judge Beatty: "The dip having an exact mathematical relation to the course of the vein is, of course, undetermined until the strike is determined; but, practically, the line of dip is closely approximated by taking the steepest, the (nearest a vertical) line by which a vein can be followed downward."[5]

§ 812. Other definitions.— The dip in different veins sometimes varies from a perpendicular to the earth's surface to an angle perhaps only a few degrees below the horizon.[6] As said by the supreme court of Montana in the case just cited: "The dip is again spoken of as the portions of the vein successively encountered in going down and away from the apex. The miner follows the dip when he works downward, leaving the apex farther from and above him at each advance."[7] It is the angle which a lode makes with the

[1] Definition by Judge W. H. Beatty, Report of Public Land Com., quoted in Duggan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887; Lindl. Mines, § 318, p. 414.

[2] R. S. U. S., § 2322; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. 819.

[3] Justice Miller in Stevens v. Williams, 1 McCrary, 480, 23 Fed. Cas. 40; Beatty, C. J., Gilpin v. Sierra Nevada M. Co., 2 Idaho, 662, 23 Pac. Rep. 547.

[4] Gilpin v. Sierra Nevada Co. *supra*.

[5] Testimony of Judge Beatty *supra*, note 1.

[6] King v. Amy & Silversmith Cons. M. Co., 9 Mont. 543, 24 Pac. Rep. 200.

[7] Id., 24 Pac. Rep. 202.

plane of the horizon,[1] the departure of the vein from the perpendicular or the horizontal.[2]

§ 813. Definition of "strike." — We have collected the judicial opinion as to the meaning of the word "strike" in a former part of this work to a considerable extent.[3] We shall therefore find it only necessary to give one general definition here. The "strike" is defined and understood to mean the onward course of the vein upon a horizontal plane or upon its apex, and sometimes upon its outcrop or surface exposure. But the outcrop is not always the strike, as that may be a dip exposure, or partly of the dip and partly of the strike.[4]

§ 814. Conventional, or judicial dip and strike.— The marking of surface boundaries is not always true to either dip or strike. And from this failure results what may be termed a "judicial" dip or strike, measured in accordance with the lines of the location, often differing from the true dip, and sometimes from the true strike.[5]

§ 815. Hanging wall and foot-wall.— The hanging wall and the foot-wall are the encasing rocks of the vein or lode, assuming it to have some inclination from a perpendicular. In all cases the upper wall is the hanging wall, and the lower the foot-wall, though it sometimes occurs that by a break in the formation a vein may be tipped over so that the posi-

[1] Von Cotta, Elements of Geology, p. 26.

[2] Morr. Min. Rights (8th ed.), Gloss, p. 426.

[3] *Ante*, §§ 287, 290.

[4] Dugan v. Davey, 4 Dak. 110, 26 N. W. Rep. 887; Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196.

[5] Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; Cons. Wyoming Co. v. Champion M. Co., 63 Fed. Rep. 540; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597; affirmed (C. C. A.), 83 Fed. Rep. 658; Clark v. Fitzgerald, 171 U. S. 91; Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55; Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78, 16 Pac. Rep. 513; Doe v. Sanger, 83 Fed. Rep. 203, 28 Pac. Rep. 365; Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. Rep. 273.

tions of the walls become reversed. If this is only temporary, they preserve their distinction, but if permanent the name is changed accordingly.

§ 816. Country rock and debris.—Country rock is a term applied to the surrounding and adjoining rock or earth forming either wall of a vein or ledge; debris is the broken and detached country rock forming the surface mass of the mountain not in place. Country rock is defined by Morrison to be rock beyond the sides of the lode or stratum, between or across which the lode is found; and debris is defined to be the loose fragments detached from the bedrock washed down, to which the term "slide" is more appropriate — waste rock of any kind.[1]

[1] Morr. Min. Rights (10th ed.), 464.

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